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IN

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THE HIGH COURT OF JUSTICE,
THE COURT FOR CROWN CASES RESERVED,
IN IRELAND,

AND

THE IRISH LAND COMMISSION.

EDITED BY

T. HENRY MAXWELL,
ONE OF HIS MAJESTY'S COUNSEL.

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Lord Chancellor.

THE RIGHT HON. SIR JAMES HENRY MUSSEN CAMPBELL, BART.

Lords Justices of Appeal.

THE RIGHT HON. STEPHEN RONAN.

THE RIGHT HON. JAMES O'CONNOR.

King's Bench Division.

THE RIGHT HON. THOMAS FRANCIS MOLONY, C.J.

THE RIGHT HON. JOHN GEORGE GIBSON.

THE RIGHT HON. WILLIAM KENNY.

THE RIGHT HON. WILLIAM HOUSTON DODD.

THE RIGHT HON. JONATHAN PIM.

THE RIGHT HON. JOHN GORDON.

THE HON. WILLIAM MOORE.

THE RIGHT HON. ARTHUR WARREN SAMUELS.

Attorney-General.

THE RIGHT HON. DENIS STANISLAUS HENRY K.C.

Solicitor-General.

DANIEL MARTIN WILSON K.C.

[These Reports will be cited as follows :—[1920] 2 I. R.]

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King's Bench Division, Nisi Prius, and Court for Crown Cases Reserved,	Hugh J. M'Cann, Hector Hughes, J. B. Burke,	Barristers-at-law.
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CORRIGENDA.

Page 20, line 9, for "*defendants*" read "*plaintiff*".
,, 84, ,, 17 ,, "*Tealon*" read "*Seaton*".
,, 116, ,, 1 ,, "1912" read "1921".
,, 143, ,, 15 ,, "sect. 1" read "sect. 5, sub-s. 1".

MEMORANDUM.

On 11th November, 1920, the Right Hon. James Owens Wylie having resigned, William Ewart Wylie K.C. was appointed a Judge of the High Court of Justice in Ireland, and a Judicial Commissioner of the Irish Land Commission.

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DETERMINED BY

THE KING'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL,

AND BY

THE COURT FOR CROWN CASES RESERVED.

1920.

GEORGE THOMAS MILLIGAN, Applicant; THE MAYOR, ALDERMEN, AND BURGESSES OF THE CITY OF LONDONDERRY, Respondents (1).

Appeal.
1919.
July 2.
Nov. 3.

Malicious injury—Compensation—Farm gate—Grand Jury (Ireland) Act, 1836 (6 *&* 7 *Wm.* 4, *c.* 116), *sect.* 135.

Section 135 of the Grand Jury (Ireland) Act, 1836 (6 & 7 Wm. 4, c. 116), enacts that compensation may be awarded for the malicious destruction or injury of "any bank, gate, . . ., or other work belonging to any person, public canal, or navigation."

Held (O'Connor L.J. dissenting), that a farm-gate is within the section.

Bell v. *King's County County Council* ([1910] 2 I. R. 25) not followed.

Case Stated by Ronan L.J. at the Spring Assizes, 1919, for the city of Londonderry, as follows:—

In this case the applicant was owner of a farm, and applied for £7 10*s*. compensation for the malicious destruction of a gate and gate-posts, his property, leading into one of the fields on

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(1) Before Sir James Campbell C., and Ronan and O'Connor L.JJ.

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said farm from the county road. The only question in the case is whether such a gate is a gate within the 135th section of 6 & 7 Wm. 4, c. 116. I found as a fact that the gate was maliciously destroyed. The County Court Judge dismissed the application on the ground that the gate was not within the section. It was an ordinary farm-gate, and in no way connected with any canal or navigation. The respondents relied on the case of *Bell* v. *King's County County Council* (1), and specially on the judgment of Holmes L.J. I then asked the applicant's counsel if he wished to have a case stated for the Court of Appeal, and he having replied in the affirmative, I agreed to state the case, the respondents raising no objection. Without having had the question fully argued, I have thought it convenient formally to decide in favour of the respondents, without expressing any opinion on the question. The question for the Court is whether the gate above described is a gate within the meaning of the 135th section of 6 & 7 Wm. 4, c. 116. If the question is answered in the negative, the order of the County Court should be affirmed. If in the affirmative, the order should be reversed, and decree for the sum of £5 10s. compensation made, being the amount agreed on between the parties.

Begley, for the appellant:—

Sect. 135 of the Grand Jury Act (6 & 7 Wm. 4, c. 116) enacts that compensation may be awarded for the malicious injury or destruction of "any bank, gate, lock, weir, sluice, bridge, dam, or other work belonging to any person, public canal, or navigation"; and the question in this case is whether "gate" in that section is confined to a gate of a canal or navigation, and does not include a farm-gate. The case chiefly relied upon by the other side is *Bell* v. *King's County County Council* (1); but I submit that the obiter dictum of Holmes L.J. in that case is not binding.

In 56 Geo. 3, c. 55, sect. 10, the words used were "bank, gate," &c., "belonging to any canal or navigation now vested or hereafter to be vested in the said directors or belonging to any other canal or navigation in Ireland." The words "belonging to any person" were omitted from that section; and their inclusion

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(1) [1910] 2 I. R. 25.

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in sect. 135 of the Grand Jury Act is proof that it was the intention of the Legislature to extend the application of sect. 10 of Geo. 3, c. 55. "Person" in sect 135 must be taken in its ordinary meaning. In *Pharmaceutical Society* v. *London and Provincial Supply Association* (1), decided before the Interpretation Act, 1889, it was decided that the word "person" did not include a corporation. Lord Selborne C. said: "There can be no question that the word 'person' may, and I should be disposed myself to say prima facie it does, include in a public statute a person in law that is a corporation as well as a natural person; but it is never to be forgotten that although that is a sense which the word will bear in law, and, as I said, perhaps should be attributed to it in the construction of such a document as a statute, unless there be any reason for a contrary construction, yet that in its popular sense and ordinary use it would hardly extend so far." The words "belonging to any person" in sect. 135 mean property belonging to private individuals; and the words "public canal or navigation" were added to give corporate bodies the same rights as those already given to individuals.

The point in issue here did not arise in *Bell's Case* (2). Here the question is how a specific word in the section should be applied, and the application of the principle of ejusdem generis, with which that case dealt, does not arise in this case.

Osborne K.C. and *Chadwick*, for the respondents:—

We submit that this case is governed by *Bell* v. *King's County County Council* (2), where the Court construed general words as excluding an ordinary farm-fence. In sect. 10 of 56 Geo. 3, c. 55, the words "bank, gate," &c., were clearly confined to canals or navigations. The first general Act giving compensation in respect of malicious injuries was 3 & 4 Wm. 4, c. 78, sect. 70 of which mentioned all the classes of property included in sect. 135 of the Grand Jury Act, 1836, with the exception of "any bank, gate," &c. It was held in *Carlow Presentment* (3), decided on the 3rd February, 1836, that sect. 70 of the 3 & 4 Will. 4, c. 78, repealed all former laws on the subject of malicious injuries to

(1) 49 L. J. Q. B. 736.

(2) [1910] 2 I. R. 25.

(3) Jebb's C.C. 180.

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property. Therefore sect. 10 of 56 Geo. 3, c. 55, was repealed. Sect. 135 of the Grand Jury Act (6 & 7 Will. 4, c. 116), passed on the 20th August, 1836, was a re-enactment of sect. 10 of 56 Geo. 3, c. 55. The words in the latter section were "any bank, gate, . . . or other work belonging to any canal or navigation now vested or hereafter to be vested in the said directors." In sect. 135 of the Act of 1836 the words are "any bank, gate, . . . or other work belonging to any persons, public canal, or navigation."

In 1836 there were two classes of canals: those belonging to private individuals and those owned by public corporations, and the words "belonging to any person" were introduced to embrace the former, while the words "public canal or navigation" mean the canals and navigations referred to in sect. 10 of 56 Geo. 3, c. 55, as vested in directors. "Person" in sect. 135 is limited strictly to canals or navigations privately owned. "Gate" in the section must, therefore, be a gate connected with a canal or navigation.

In *Bell's Case* (1) the Court held that "other work" in sect. 135 of the Grand Jury Act must be taken as ejusdem generis with what went before; and, referring to the preceding words, which include "gate," Holmes L.J. says: "And it is a matter of certainty that, if we are to construe them in that particular way, they must refer to something connected with a canal or navigation, because all the previous words would be misdescriptions if otherwise applied." In this judgment he concurred with the Lord Chancellor, and Cherry L.J. also concurred. It is, therefore, we submit, quite clear that the decision excludes a farm-gate from the purview of sect. 135. If every bank, gate, &c., were meant to be included, why were the words "belonging to any person, public canal, or navigation" put in at all?

[They referred to *Re FitzPatrick* (2); *Re Revington* (3); *Re Collier* (4).]

(1) [1910] 2 I. R. 25.
(2) Ir. Cir. Rep. 819.
(3) 15 I. L. T. R. 50.
(4) 8 I. L. T. R. 208.

Sir James H. Campbell C.:—

Prior to the date of the passing of the Local Government (Ireland) Act, 1898, the right to compensation for malicious injury to property was regulated by the provisions of 6 & 7 Wm. 4, c. 116, sect. 135, but by sect. 5 of the Act of 1898 the provisions of this section of the earlier Act were extended to all property, real or personal, with the limitation that the injurious act must be a crime punishable on indictment under the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97). The application in the present case was in respect of an ordinary gate of a farm, which has been found to have been damaged to an extent exceeding £5. Sect. 51 of the Malicious Damage Act provides that in all cases of malicious injury to any property, for which no punishment is provided by the preceding sections, the perpetrator shall be guilty of a misdemeanour where the injury exceeds £5 in amount. The applicant's compensation, assuming him to be entitled to succeed, exceeds this limit, but, inasmuch as punishment by summary conviction is expressly enacted by section 25 of the Act in the case of malicious injury to a gate, his case is outside the provisions of sect. 51, and consequently sect. 5 of the Local Government (Ireland) Act, 1898, has no application to his claim. He, however, contends that his case is expressly included within the subject-matters of property enumerated in sect. 135 of 6 & 7 Wm. 4, c. 116, which provides for compensation for malicious injury to "any gate belonging to any person." Upon the other hand, the Borough Council insist that as the result of the decision of this Court in *Bell* v. *King's County County Council* (1) no gate is within the section unless it belongs to a canal or navigation. I need hardly say that if it has been held in this Court that when the Legislature provided compensation in express terms for malicious injury to "any gate belonging to any person," it only intended to provide it in the exceptional case of a gate belonging to a canal or navigation, I should loyally follow the decision, even though I was totally unable to comprehend it; but I am satisfied that no sanction for any such startling proposition is to be found in the judgments of the majority of the Court, and that the point, and only point, upon which the members of the Court were agreed is to be found clearly enunciated in the judgment of Walker C.

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(1) [1910] 2 I. R. 25.

In *Bell's Case* (1) the claim was in respect of an ordinary road fence of wire, which had been maliciously damaged, but only to the extent of £3, and the applicant based his claim upon the peculiar contention that, admitting that the words in sects. 135, "or other work," must be construed as ejusdem generis with the works expressly enumerated by the preceding words of the same clause, a road fence was ejusdem generis with a gate, and, therefore, within the section. If we now turn to the judgments in the case, and consider, first, the judgment of Walker C., it is absolutely plain and clear that the point which he himself decided, and which he understood to be the point upon which the members of the Court were agreed, was that a fence of the kind was not "ejusdem generis" with a gate. I shall quote the material passages. Sect. 135, he says, deals with five subject-matters, the last of which he describes in the precise words of the section as "any bank, gate, lock, weir, sluice, bridge, dam, or other work belonging to any person, public canal, or navigation," and he goes on to state that the words "other work" are ejusdem generis with the previously enumerated works with which they are coupled. Finally, he concludes with these important words: "The applicant is, therefore, remitted to the 135th section. We must construe this section as we find it; and as we are all of opinion that the words 'or other works' are ejusdem generis with those immediately preceding, we cannot hold that the malicious damage to the fence here in question comes within the purview of the section." Holmes L.J. says: "I have always understood, however, that it was definitely settled prior to the passing of the Local Government (Ireland) Act of 1898 that the words 'other work' in this section of the Grand Jury Act must be taken to be ejusdem generis with what went before." Cherry L.J., according to the report, simply concurred; but we have been supplied by the Registrar, from his most careful and valuable notes, with a few observations made by the Lord Justice in expressing his concurrence, and these plainly refer, and only refer, to this same point.

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(1) [1910] 2 I. R. 25.

The decision of this Court in *Bell's Case* (1), to the effect that the wire fence of a road is not ejusdem generis with a gate, is fortified by a reference to sect. 25 of the Malicious Damage Act, which does not seem to have been noticed in the case. This section deals with injury "to any fence of any description whatsoever, or any wall, stile, or gate," thereby indicating that a gate did not come within any description of a fence.

So far it is plain that these judgments do not even touch the question for decision in the case before us, to which, upon its facts, the doctrine of ejusdem generis has not even the remotest application, inasmuch as a gate is dealt with by express enumeration, so that we are not called upon to consider or decide the meaning or extent of the words "or other work." The controversy, however, has arisen owing to the addition by Holmes L.J. of the following passage to his judgment, in which he is referring to the words of this portion of section 135: "It is a matter of certainty that if we are to construe them in that particular way [i.e. by the doctrine of ejusdem generis], they must refer to something connected with a canal or navigation, because all the previous words would be misdescription if otherwise applied."

With all respect for the learned Lord Justice, I am of opinion that both his reasoning and conclusion are far-fetched and fallacious. Simply stated, his proposition amounts to this: The terms bank, gate, lock, weir, sluice, bridge, or dam would be a misdescription if applied to any subject-matter except a canal or navigation, and, therefore, you must read the clause as if the words "belonging to any person, public canal, or navigation" read "belonging to any private or public canal or navigation." I know of no canon of construction which compels to the strange conclusion that the words "any gate belonging to any person" must and can refer only to a gate connected with a canal or navigation, and the argument that none of the words describing the enumerated works could, without misdescription, be applied to anything but a canal or navigation is to me unintelligible. Is it conceivable, for example, that it would be a misdescription to apply all or any of the terms bank, gate, weir, sluice, bridge, or dam to a

(1) [1910] 2 I. R. 25.

mill-race, waterworks, fishery, non-navigable river, drainage works, or works to resist erosion; or to speak of the bank, gate, or bridge of a railway, road, aqueduct, private park, or ornamental pond? And yet the Lord Justice asserts that each and all can have no connexion with any subject-matter save a canal or navigation; so that, if we accept this dictum, we must necessarily exclude from the operation of the section, for no reason that I can imagine or suggest, every single one of these works when found in connexion with any one of the subject-matters I have enumerated. In so doing one is also eliminating from what has been described by Pigot C.B., in *Re Herbert* (1), as a highly remedial section, the words "belonging to any person," which, as we were told by counsel on both sides, are not to be found in any previous Act, and were, therefore, presumably intended as an extension of the former legislation. In their natural and ordinary sense they cover and include every bank, &c., belonging to any person, and if the Legislature intended to confine them to such banks, &c., as belonged to any canal or navigation, public or private, it would have been simplicity itself to say so.

This sect. 135 has been in force for nearly a century, and we have not been referred to, nor have I been able to find, a single instance in which the application for compensation in respect of malicious injury to any one of the works expressly enumerated has been ruled to be outside the section by reason merely of the purpose for which it was erected, or the use to which it was applied. Indeed I go further, and say that in an experience of nearly forty years in malicious injury claims on circuit I have never known the right to compensation in respect of any one of these specified works to be even questioned upon any such ground, while I have known awards to have been frequently made in respect of them in cases where they had not even the remotest connexion with either a canal or navigation; nor is there to be found in Foot's or Vanston's text-book the faintest suggestion of any such limitation of the language of the section. Further, there will be found in the Irish Law Times Reports a number of cases in which the injured property had no connexion with a canal or navigation, and in which the right to compensation was

(1) I. R. 3 C. L. 556.

held to depend upon whether the property in question was, or was not, ejusdem generis with the works enumerated.

Holding, as I do, for the reasons I have stated, that *Bell's Case* (1) is in no sense an authority upon this question, I am free to find, and do find, that the gate in this case, of which the applicant was the owner, was "a gate belonging to a person," and, therefore, included in the section by express reference and intention.

Ronan L.J.:—

I concur with the judgment of the Lord Chancellor. The case of the Corporation depends mainly on the dictum of Holmes L.J., quoted by the Lord Chancellor. No one has greater respect than I have for the opinion of the Lord Justice; but if, in our opinion, the dictum does not state the true effect of the statute, we are bound not to act on it. The words of the Act are "any bank, gate," &c., "or other work *belonging to any person, public canal, or navigation.*" The words in italics are an elliptical phrase. Supplying the necessary words, can there be any doubt that it should run: "belonging to any person (*or* belonging to any), public canal, or (belonging to any public) navigation. The term "belonging to" has a wholly different meaning when applied to a person (where it means "the property of"), and when applied to an inanimate object, such as a house, a canal. In this latter case it means "forming part of," or "being an adjunct to," or "connected with," &c. See the various illustrations in Stroud, under "Belong." Holmes L.J. says the words "must refer to something connected with a canal or navigation." I agree with this when we are dealing with "belonging to a canal or navigation." There are second and third classes provided for by the express words of the Act, but not when we are dealing with the first class, viz. "belonging to any person."

What Holmes L.J. really does is this: He construes the clause as if it were "belonging to any person, (and also) belonging to any public canal or navigation." This is inserting in the Act itself, after the word "person," the word "and" instead of the

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(1) [1910] 2 I. R. 25.

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word "or," which is clearly what the plain grammatical construction of the language requires. It is in truth and substance a case of turning "or" into "and." Under what conditions does the law permit this to be done in the case of a statute? In *Mersey Docks and Harbour Board* v. *Henderson Bros.* (1) Lord Halsbury C. says: "In the first place, I know no authority for such a proceeding, unless the context makes the necessary meaning of 'or' 'and,' as in some instances it does; but I believe it is wholly unexampled so to read it when doing so will upon one construction entirely alter the meaning of the sentence, unless some other part of the same statute, or the clear intention of it, requires that to be done, as in the case of *Fowler* v. *Padget* (2), where the Act of Jac. 1, c. 15, made it an act of bankruptcy for a trader to leave his dwelling-house to the intent or whereby his creditors might be defeated or delayed. These words, if construed literally, would have made every trader commit an act of bankruptcy if he casually left his dwelling-house, and some creditor called for payment during his absence. It may indeed be doubted whether some of the cases of turning 'or' into 'and,' and vice versâ, have not gone to the extreme limit of interpretation."

In my opinion the judgment of the Lord Chancellor has clearly shown that the context entirely fails to make it necessary to insert "and." It has not been shown either that other parts of the statute, or its clear intention, require the insertion of "and." I think that he has also shown the very grave consequences that would ensue from applying the view of the Lord Justice.

I think the draftsman probably thought that "belonging to any person" would only include what I may call private property, and that the clauses as to canals and navigation were intended to apply to public property, and to cases where the injury is to the public, and not to any individual or individuals.

Lastly, if we did insert "and" after "person," the result would be that the public canal and public navigation clauses would only apply where the bank, &c., also belonged to some individual or individuals.

(1) 13 A. C. 595.

(2) 7 T. R. 509.

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O'Connor L.J.:—

I regret that I cannot agree, for, in my opinion, the question in this case is settled by the decision in *Bell* v. *King's Co. County Council* (1). In that case the question was whether a wire fence came within sect. 135 of the Grand Jury Act, 1836. It was argued that it did, because it was captured by the words "or other work." Now, a fence is a "work" of sorts—that is, it is an artificial construction. But the Court held that each and all of the immediately preceding words in the section—bank, gate, lock, weir, sluice, bridge, dam—meant "works" of a particular kind, namely, works connected with a canal or navigation. The Lord Chancellor's judgment is based on this: that the section included, not all works, but works of a particular kind. No doubt, he does not expressly say that the particular kind was confined to works connected with a canal or navigation, but otherwise his judgment would be meaningless, for no other particular kind was or could be suggested. Holmes L.J., however, was perfectly explicit in his statement that all the words in the section referred to works connected with a canal or navigation, and Cherry L.J. concurred.

I therefore am of opinion that we are bound by *Bell's Case* (1) to decide this case against the applicant, and I may add that if the question were res integra I should, having regard to the principle of noscitur a sociis, be of the same opinion.

Solicitor for the appellant: *Wm. Foster.*
Solicitor for the respondents: *Sir F. H. Miller.*

C. L.

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(1) [1910] 2 I. R. 25.

K. B. Div.
1919.
May 22.

Appeal.
1919.
July 1, 2.
Nov. 3.

BYRNE *v.* RUDD AND OTHERS, TRUSTEES OF THE CITY OF DUBLIN ASSURANCE SOCIETY (1).

Insurance Policy—Misrepresentation by agent—Authority to make—Ultra vires transaction—No right to retain benefit so obtained—Return of Premium—Friendly Societies Act, 1896 (59 *&* 60 *Vict. c.* 25), *sect.* 45.

A person was induced to take out an endowment policy in an Assurance Society registered under the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), on the representation of the society's agent, that on payment of a first premium the insured would obtain an immediate loan of £100 without security and without interest. Under the Act a registered society can make loans only to members of at least one full year's standing. Having paid the premium, the insured applied to the society for a loan of £100; but, relying on the statute and their rules, the society refused to grant the application. Thereupon the insured, alleging false and fraudulent representation on the part of the society's agent, claimed by Civil Bill process the return of the premium.

Held, by the King's Bench Division (Gibson and Gordon JJ.), that the complete absence of authority in the agent to make the representation, or to give the undertaking, made it impossible for the plaintiff either to fix the society with fraud or to recover back the cash; and that, viewed as an ultra vires transaction, the payment could not found any legal remedy.

Held, by the Court of Appeal (reversing the King's Bench Division), that the society could not be allowed to retain money which had been procured for and received by it under a contract which the insured had been induced to enter into by the fraudulent misrepresentation of its agent; that even though the agent's representation involved the doing of an act which was illegal or ultra vires on the part of the principal, he was nevertheless acting within the scope of his authority in making it, in so far at least as to deprive the society of the right to retain any benefit under it.

CASE STATED by Moore J., upon an appeal by the defendants against a decree by the Recorder of Dublin for £7 5*s.* 10*d.*, on a process for false and fraudulent representation of the defendants' agents.

The plaintiff was a railway servant, residing at Ballybrophy, Queen's County, and the defendants were the trustees of the City of Dublin Assurance Collecting Society, a friendly society, registered under the Friendly Societies Act, 1896. The case set out the facts as follows:—

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(1) In the Court of Appeal, before SIR JAMES CAMPBELL C., and RONAN and O'CONNOR L.JJ.

The society of which the defendants are the trustees have persons employed as agents, who canvass for persons to join the said society as members at certain premiums, and among other objects grant endowment policies.

Evidence was offered that one B. Gaughran, who was an agent of the said society, visited the plaintiff at his residence in December, 1917, and represented to the plaintiff that if he insured and took out an endowment policy in the said society, and paid a first premium of £7 5*s.* 10*d.*, he would obtain an immediate loan of £100 without security and without interest. The plaintiff was desirous to get the loan in order to purchase certain land which was being distributed amongst the poor people of the district at a reduced price by trustees, who had purchased a large estate. The said agent was aware of this, and discussed it with the plaintiff. The plaintiff signed a proposal and application for a policy, which declared that the proposal and declaration should be the basis of the contract entered into between him and the society, and that the proposer had signed the proposal, having first read the prospectus. The plaintiff had not in fact read the prospectus, nor were its contents communicated to him. The declaration with the plaintiff's signature and the prospectus were proved. The plaintiff borrowed the said sum of £7 5*s.* 10*d.* from a brother, John Byrne, and paid the said sum to the society, whose receipt for the said sum was proved. An endowment policy, dated the 1st day of December, 1917, for the sum of £200 policy, was produced in Court.

The plaintiff admitted that a green book was shown to him by the agent, Gaughran, but that he did not read same, nor were its contents communicated to him. No evidence was offered by cross-examination or otherwise that the plaintiff knew the society was a friendly society within the meaning of the Friendly Societies Acts.

In February, 1918, the plaintiff applied to the society for a loan of £100 on his policy of assurance for £200. The manager of the society replied that no loans were granted until a policy was a year in force, and that in any event the applicant had not stated what security he intended to offer. Correspondence proved.

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The prospectus contained a statement on p. 3 that loans to members would be granted on approved security after one year's membership.

Mr. Joseph O'Connor appeared for the plaintiff, and contended that the agent of the society, having obtained the signature of the plaintiff to the proposal by misrepresentation and fraud, the society were not entitled to keep the money thus obtained, and that the plaintiff was entitled to the sum paid. He relied on the *Components Tube Company, Ltd.*, v. *Naylor* (1), and *Kettlewell's Case* (2).

Mr. A. Alfred Dickie K.C. and Mr. James Henry appeared for the defendants, and contended that under sect. 45 of the Friendly Societies Act, 1896, the society could not make any advance to a member unless he was a member of at least one full year's standing; that this was stated expressly in the prospectus. That it could not be in the course of the agent's business to make a statement or give an undertaking promising to do a thing which the Society itself was debarred from doing by Act of Parliament. That the plaintiff was supposed to know the law; that he is not permitted to allege that he was misled by a statement which he is deemed to have known to be contrary to law. That the claim is with reference to the collateral agreement, which should be in writing. That none of the authorities quoted apply. That Phillimore J. in *Kettlewell's Case* (2) expressly settled the point that it must be in the course of the agent's employment. They cited *Harse* v. *Pearl Life Assurance Company* (3); *Montreal Assurance Company* v. *Macgillivrey* (4).

I found that the plaintiff was a man in a humble station in life, and of corresponding education; that he did not in fact at the time of payment of the £7 5*s.* 10*d.* know of any of the terms of the prospectus, nor of the statutory limitations of the power of making advances affecting the defendants' society, nor was there any evidence that he knew that the society was a society to which such statutory limitation applied; that the defendants did not directly authorize Gaughran to make any misrepresentations, but that Gaughran in fact made such misrepresentations to the plaintiff in

(1) [1900] 2 I. R., at p. 37.
(2) [1909] A. C. 424.
(3) [1903] 2 K. B. 92.
(4) 13 Moore, P. C. 87.

the course of a canvass for customers which the defendants employed him to make, and that but for Gaughran's misrepresentation that plaintiff would be entitled to an immediate advance without security the plaintiff would not have entered into the contract and paid the money sought to be recovered in the process.

I was about to affirm the decision of the learned Recorder when Mr. Dickie informed me that this was a test case, and that the validity of other policies obtained by Gaughran would be ruled by my decision, and requested me to state a case for the opinion of the Divisional Court. This I agreed to do on the terms that in no event should the plaintiff be liable for the defendants' costs of such case.

The question for the Court is whether or not on the foregoing evidence and findings of fact the plaintiff is entitled to succeed in the action, and whether the decree of the learned Recorder should be (*a*) affirmed, or (*b*) reversed.

Swayne K.C. and *J. O'Connor*, for the plaintiff.
Dickie K.C. and *James Henry*, for the defendants.

The arguments were similar to those in the Court of Appeal.

GIBSON J.:—

This action was for false and fraudulent representation—really a promise—that if the plaintiff would insure with the society and pay a premium on the policy, the society would immediately lend him £100 without security, which promise having been repudiated by the society, the plaintiff is entitled, it is said, to refund of the premiums. The contract or representation alleged was admittedly contrary to the statute of 1896, under which the society was registered, and it is as representing such registered society that the defendants were sued. The action is not so much one for fraud as to recover the premium on the basis of rescission, the consideration having entirely failed. The plaintiff still holds the policy; no offer to return the policy or restitutio in integrum is averred. I shall, however, assume in the plaintiff's favour that when demanding refund of the premium he disclaimed all benefit or interest in the policy. The plaintiff signed a proposal which he ought to have known contained terms of the contract; and it is difficult for him legally to rely on ignorance of the contract terms or of the nature of the society. I shall assume, for the purpose of my decision, that he was, in fact, unaware of the terms, and that he believed (if such belief was legally competent) that the society could lawfully make the advance.

The first point made for the defendants is that the case stated contains no finding as to fraud, if that is material, which the plaintiff's counsel contend it is not, as misrepresentation justifies rescission where restitutio in integrum is possible.

As the case describes the Recorder's decree as based on fraud, and the Judge was prepared to affirm his decision, I think that fraud was intended to be found. But what fraud? Merely to promise that the loan would be made when the society was disabled from fulfilling the promise or representation might be only a mistake of law, but would not be of itself fraudulent. The fraud must be found in the agent's knowledge that the society was incapable of fulfilling the promise. Was this the Judge's view in finding fraud? The agent might have been ignorant of the law as well as the plaintiff.

This brings me to the defendants' next objection. The promise, contract, or representation, if made, was improvident from any point of view: a loan of £100 with no security, and only one small premium paid. The loan was to assist the plaintiff in acquiring a farm, but no charge on the farm when purchased was proposed to be created, and even an undertaking to create such charge in future would have been no security at all. The Judge, however, appears to have accepted the plaintiff's evidence as true and reliable. On that assumption, the defendants' counsel argue that the representation cannot be deemed to have caused the plaintiff's payment of the premiums, for he must be taken to have known the public statute and the disability of the society with which he was contracting, and which he now sues as liable to him. It is not a case of mistake as to private or disputable rights or as to doubtful law. Everyone dealing with a corporate or quasi-corporate body (and it is in that character the defendants are sued) must be taken to know of its general Act, articles, and statutory limitations as distinct from its inside economy and administration. This is clearly so in the case of a limited company, as to which there are many authorities. The principle applies a fortiori to a society governed ab initio by a public enactment which prescribes and limits its capacity on broad grounds of public policy. The society here was disabled from its birth from making any such loan as described. Fraudulent agents, whose misrepresentations may have caused loss to the persons deceived, may be answerable, but the corporate entity is incapable of such sin. If it could be deemed guilty, so might the plaintiff also be deemed.

Defendants' counsel next urge that the agent, if guilty of tort or breach of warranty or of contract, in representing that the society would give an advance which they could not lawfully do, was acting outside and beyond the scope of authority. That he had no such authority is certain. The society could not have conferred it, even if they purported to do so in express terms, and there is no evidence of any such express illegal authority, nor could the doctrine of holding out apply. A canvassing agent does not possess carte blanche to bind his principals by his extravagant representations, and the statute of 1896 would exclude any such possibility. The plaintiff's counsel, however, reply that, assuming that the representation cannot bind the society, still the society, on equitable principles, cannot be allowed to retain the cash obtained by the untrue representation. Chattel property remaining in the defendants' possession might be recovered, but the position is not at all the same when we are dealing with currency which cannot be identified or followed, and the present civil bill does not allow any inquiry how the money was in fact applied. No authority has been cited to show that such a society as the present can be made to repay where the promise or representation was ultra vires all through as regards both the society and its unauthorized agent. Where a transaction might be intra vires, different considerations would apply. In its essence the plaintiff's complaint is that the contract was one and entire, and that he paid his premium in the belief induced by the canvasser that the society not only could but would make the advance. The society was supposed by the plaintiff to be contracting to lend as the consideration for the plaintiff's taking out the policy.

I am unable to see how the society, which got and spent the money without any knowledge of fraud or contract to lend, and

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under the belief that the money represented a premium paid in ordinary course, can be under any liability to the plaintiff outside their legal contract, of which alone they had knowledge. Fraud, if any, by a person not acting with authority cannot be imputed. Money paid in the apparent course of duty and received and applied in good faith, cannot be got back. The remedy, if any, would be against individuals. Suppose an agent, by fraud, cheating, or theft, got hold of money, and in order to conceal defalcations paid it over to his principals, the latter would be under no actionable liability to the person defrauded or cheated. The complete absence of authority in the canvasser to make the representation or give the undertaking makes it impossible for the plaintiff either to fix the society with fraud or to recover back the cash paid, there being no nexus or connexion through legitimate agency between the plaintiff and the society. The canvasser may have been possibly liable as a wrongdoer or may have warranted his authority, but between him and the society he was professing to pay money received by him in due course of agency. The society took the money as currency from one who, if he was guilty of fraud, was not their agent in reference to such fraud. This objection to the competence of the action in any aspect seems to me unanswerable. Whether misrepresentation of law can ever found an action is a matter not now calling for decision.

The defendants' final point is analogous. It is that payment cannot be enforced on the principle of ultra vires, which, even if the society had entered into an express contract to lend, would have left the plaintiff without remedy. If we were dealing, not with money as currency, but with a specific chattel, the true owner (as already observed), who had parted only with the possession but not with the property, would be entitled to recover the chattel from the corporate body in possession of it under a void contract repudiated by them as ultra vires. Money, however, melted into the corporate funds is protected by the doctrine of ultra vires. Can the fact that the money has been paid on misrepresentation as to the contractual capacity of a statutory corporation make a difference? Even if it might, a misrepresentation by an unauthorized person could not enable money to be got back when it was received and applied without knowledge of any undue dealing or taint affecting its origin. The society here settled its accounts with its agent on the footing that the cash represented legitimate earnings. Whether the claim is for fraud, breach of contract, or restitution, it must equally fail. The society begotten by and the child of statute, with strictly defined constitutional capacity, cannot as such perpetrate fraud, and, if it theoretically could, it cannot be made responsible in damages for acts of persons without authority. Such individuals alone would be liable. Viewed as an ultra vires transaction, the payment cannot found any legal remedy. The action is therefore in any shape untenable.

Gordon J.:—

This case has been fully argued, and the whole question at issue resolves itself into the simple one whether the plaintiff, who alleges he has been deceived by the misrepresentations of the defendants' agent is entitled to recover the seven pounds odd paid by him as a first premium on the policy of assurance which was the subject of the contract entered into between the parties. It has been stated by the plaintiff that his sole reason for entering into the contract was to enable him to borrow money at once without any security save that of the policy, and that when he discovered that the defendants would not lend on the security of the policy alone he repudiated the transaction. On the facts it is very difficult to come to the conclusion that any sane and sensible man would have believed a representation if made by the defendants' agent that immediately on the taking out of the policy the society would lend £100 without any security save that of the policy on which only one premium had been paid, but the learned Judge has found in effect that the plaintiff did believe it, and acted upon it. The society would have had no power to do what the agent undertook, and the agent had no power to make such a representation on behalf of the society. That representation was altogether ultra vires. The society received in the ordinary course of business a proposal in the ordinary form signed by the plaintiff. It came regularly before them at the instance of its agent. Accordingly, at the time the policy was issued the society had every reason to assume that everything was right and regular. I think that when the plaintiff found out that the policy was not regularly obtained,

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and that the agent had induced him to enter into it by misrepresentations, he was entitled to rescind the contract. He has not rescinded. The society issued the policy, which is still subsisting. They have received the premium and put it with their own moneys, and I do not think that the plaintiff is now entitled to get it back from them. I fail to see how the society can be made responsible, and in my opinion the plaintiff has no ground upon which he can succeed.

H. H.

July 1, 2.
Nov. 3.

The defendants appealed (1).

Gibson K.C. and *Patton*, for the appellant:—

We submit that there was a fraudulent misrepresentation by the agent of the company; and that the latter cannot, whether they authorized the fraud or not, retain for their own benefit money so obtained: *Components Tube Co.* v. *Naylor* (2); *Kettlewell* v. *Refuge Assurance Co.* (3).

Alternatively, we submit that where by a misrepresentation made without fraud a person is induced to effect a policy invalid in law, the premium paid in respect thereof can be recovered back: *British Workman's and General Assurance Co.* (4).

Dickie K.C. and *James Henry*, for the respondent:—

Moore J. has not found fraud, and the appellant has got everything to which he was entitled. Assuming that there has been no finding of fraud, this is a case of innocent misrepresentation of a fact, and the money paid cannot be recovered: *Hasse* v. *Pearl Life Assurance Company* (5). A misrepresentation of law does not give rise to an action of deceit nor even make a contract voidable as against the person making the statement. Anson, Law of Contract (6).

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(1) In the Court of Appeal, before SIR JAMES CAMPBELL C., and RONAN and O'CONNOR L.JJ.

(2) [1900] 2 I. R. 1, at p. 37.

(3) [1907] 2 K. B. 242, at p. 246; [1908] 1 K. B. 545, at p. 552; and [1909] A. C. 243.

(4) 18 T. L. R. 425.

(5) [1904] 1 K. B. 558.

(6) 14th edition, p. 205.

The law on this subject has been radically changed by *Sinclair* v. *Brougham* (1), where it was held that a banking business carried on by a society empowered to borrow to an unlimited extent for the purpose of raising a fund to enable members to purchase houses was ultra vires, and that the depositors were not entitled to recover moneys paid by them on an ultra vires contract of loan on the footing of money had and received by the society to their use. Lord Sumner, at page 452, says:—" There was no failure of consideration. As Bowen L.J. says in the *Guardian Case* (2):—' Those who deal with a society which professes to have power to borrow have equal means of knowledge with the society itself of the statutory powers of the company; they are put, so to speak, upon inquiry whether the company really can borrow validly or not, and, if they choose to lend their money to a company which cannot properly borrow, it cannot be said there is a failure of consideration. The company has got their money, it is true, but they must be taken to have known what they bought, and to have been willing to pay their money on the chance.' " Under the Friendly Societies Act, 1896 (59 & 60 Vict., chapter 25), sect. 45, a registered society can make loans only to members of at least one full year's standing. It would be ultra vires for the society to make a loan in this case; and the agent was restricted by the limitation of the powers of the society: *Montreal Assurance Co.* v. *MacGillivray* (3). Where an infant obtains money by fraudulent misrepresentation, the plea of infancy is a good defence to an action against him for recovery of the money: *Leslie, Ltd.*, v. *Sheill* (4). Here we have two separate contracts: one a collateral agreement to lend money, which contract was ultra vires, and upon which no action can be maintained; the other a contract of insurance simply, which the society is willing to perform.

Patton, in reply, referred to *Hughes* v. *Liverpool Victoria Legal Friendly Society* (5).

(1) [1914] A.C. 398.
(2) 23 Ch. D., at p. 470.
(3) 13 Moore, P. C. 87.
(4) [1914] 3 K. B. 607.
(5) [1916] 2 K. B. 482.

SIR JAMES CAMPBELL C.:—

The amount at stake in this case is very trifling in comparison with the importance of the principle involved. The plaintiff is a railway porter, employed as such at Thurles in the service of the Great Southern and Western Railway Company. He was anxious to procure a loan of £100 in order to purchase a plot of land, and, being informed by a canvassing agent of the defendants that if he effected a policy of insurance on his own life for £200 with the company he would upon the payment of the first premium be entitled under his contract to a loan from the company of the £100 upon the security of the policy, he accordingly upon the faith of this representation signed the usual proposal form, and paid to the agent the stipulated annual premium in respect of a policy of insurance for the agreed amount. Shortly afterwards he applied to the defendants for the loan of the £100, but was met with the reply that, being a friendly society registered under the Friendly Societies Acts, they were both by statute and their own rules, which for this purpose incorporate the provisions of the statute, prohibited from lending any money to a policy-holder until his membership had lasted for a year, and then only on approved security. The plaintiff thereupon, after some correspondence, sued the company by civil-bill process before the Recorder of Dublin for the recovery of this premium as money had and received by them from him through the fraudulent misrepresentation of their agent, and obtained a decree for the amount. A formal appeal from this decree was taken by the company to the King's Bench Division, with the result that the decree was affirmed by Moore J.; but at the request of the defendants he stated a case for the opinion of the Divisional Court. The case itself is not very happily framed, as the learned Judge does not formulate his findings of fact; but inasmuch as he sets out the contentions on both sides, and states that he affirmed the decision of the Recorder, we are of opinion that we should thereby infer, as Gibson J. also appears to have done in the Divisional Court, that he found as a fact that the representation alleged was made by the agent of the defendants, that it was made by him for the purpose of inducing the plaintiff to effect the policy of insurance and to pay the premium, that the representation was false to the knowledge of the agent at the time he made it, and that the plaintiff, believing the representation to be true, was thereby induced to sign the proposal and pay the premium.

Although Gibson J. first states that as the decision of the Recorder was based on fraud, and Moore J. in affirming this decision must have intended to find fraud, he goes on to add: "But what fraud? The agent might have been ignorant of the law as well as the plaintiff." I am unable to understand this query, inasmuch as the only fraud alleged is this particular misrepresentation by the agent; and, as it could not have been fraudulent unless it was false to the knowledge of the agent, it seems inevitably to follow that if we are to assume, as I agree with Gibson J. we must, that Moore J. found fraud, the fraud must be in the representation by the agent of a matter which he knew to be false. Again, while Gibson J. states that he would assume in the plaintiff's favour that when demanding the refund of the premium he disclaimed all benefit or interest in the policy, Gordon J. says that the plaintiff has not rescinded the contract. This latter contention was not even raised or argued before us, and I can imagine no more unequivocal act of repudiation by the plaintiff of the contract than the issue by him of the process to recover the premium paid under it.

The facts, as I have stated them, seem fully to justify the application by the Recorder of Dublin and of Moore J. of the elementary principle of law, that a defendant will not be allowed to retain money which has been procured for and received by him through the fraud of his agent. Inasmuch, however, as the Divisional Court, consisting of Gibson J. and Gordon J., have reversed the decision of the Recorder, and its affirmance on appeal by Moore J., and as we are now restoring the original decree in favour of the plaintiff, it is right that I should state the reasons for my inability to concur in the judgments of the Divisional Court. As I understand these judgments, they are based upon the proposition that, inasmuch as the misrepresentation relied upon involved the doing of an act by the company which would have been ultra vires on their part, and therefore was a representation which they themselves could not legally have made, no authority to make it can be presumed on the part of their agent,

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and that he cannot therefore be presumed to have acted within the scope of his authority in making it, nor could he thereby impose any liability upon his principal. With all respect, this attempt to apply such a proposition to the facts of this case involves a confusion of thought and a failure to discriminate between a claim by a party to enforce as against a principal a contract which has been procured by the fraudulent representation of his agent as to a matter which would be ultra vires on the part of the principal, and a claim by the same party to rescind the contract and to recover from the principal the money which he has received under it.

It is remarkable that in neither of the judgments is there a single case referred to in support of the proposition upon which they are based, while, upon the other hand, it is no exaggeration to say that there are scores of unquestioned decisions to the contrary effect, which must apparently have been overlooked, as it is difficult to believe that it was the intention of either of the learned Judges to dissent from them. These decisions are conversant with contracts of different kinds, but I shall only refer to those in which the contract was, as in the present case, one of life insurance. In *British Workman's and General Assurance Co.* v. *Cunliffe* (1), a person who had been induced to effect two policies, on lives in which he had no insurable interest, by the representation of the agent of the company that they were good and valid, was held in the Divisional Court to be entitled to recover back the premiums he had paid, even though the representation was innocently made; but the Court of Appeal, in affirming this decision, appear to have based their judgments upon the assumption that the agent was aware that his representation was false.

In *Harse* v. *Pearl Life Assurance Company* (2) the plaintiff was induced to effect two policies on the life of his mother upon the representation by the agent of the insurance company that the policies were valid; but twelve years later, and before the life fell in, upon being informed that the policies were void for want of insurable interest, he brought an action in the County Court to recover the premiums he had paid. The jury found that the agent, in making the representation that the policies were valid, did not know that his statement was untrue, and the County Court Judge ruled that as the representation was innocently made the parties were in pari delicto, and that consequently the defendants were entitled to retain the premiums. In the King's Bench Division this decision was reversed, the Court being of opinion that, as the plaintiff was entitled to assume that the agent of the defendants had a knowledge of insurance law, the parties were not in pari delicto, and the plaintiff was, therefore, entitled to recover the premiums, Alverstone C.J. and Channell J., who were also members of the court of first instance in *British Workman's and General Assurance Co.* v. *Cunliffe* (1), expressing the opinion that the Court of Appeal in that case, though holding that the agent knew his representation to be false, did not intend to negative the wider proposition that where a party is ignorant of the law, but relies upon the representation of a person presumably possessed of a peculiar knowledge of the particular branch of the law involved, he is not in pari delicto, even though the representation was innocently made. The Court of Appeal, however, reversed this decision of the Divisional Court, holding that, as the representation made by the agent was as to a matter of law, and was made innocently, the parties were in pari delicto. Collins M.R., in his judgment (2), says: "Unless there can be introduced the element of fraud, duress, or oppression, or difference in the position of the parties which created a fiduciary relationship to the plaintiff, so as to make it inequitable for the defendants to insist on the bargain that they had made with the plaintiff, he is in the position of a person who has made an illegal contract, and has sustained a loss in consequence of a misstatement of law, and must submit to that loss. We have the clear authority of this Court in *British Workman's and General Assurance Co.* v. *Cunliffe* (1). This Court affirmed the decision (of the Divisional Court) that the money could be recovered, but did so expressly on the ground that the statement on which the assured acted was fraudulently made. This Court to that extent qualified, or at the least did not adopt, the ground of the judgment below." Romer L.J., in concurring, also lays stress upon the fact that there was no fraud in the case.

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(1) 18 T. L. R. 425.

(2) [1903] 2 K. B. 92.

(1) 18 T. L. R. 425.

(2) [1904] 1 K. B 558.

These two cases are clear and distinct authorities for the proposition that a plaintiff is entitled to recover back from the insurers the premiums he has paid under a contract of insurance, into which he has been induced to enter by the fraudulent misrepresentation of the agent of the insurers in reference to a subject which, to some extent at least, as in the case before us, involved a matter of law, namely, the validity of the contract, or the particular obligations which it imposed upon the company.

In *Kettlewell* v. *Refuge Assurance Co.* (1) the plaintiff, after paying the premiums upon a life policy for a year, intimated to the agent of the company her intention to let the policy lapse, but was induced by them to continue the payment of the premiums for a further four years, upon his fraudulent representation that at the expiration of five years from the date of the policy she would be entitled to a free policy. At the end of the five years she applied for a free policy, but her request was refused by the company, and she thereupon sued them in the County Court for the recovery of the premiums paid during the four years. It was proved on behalf of the defendants that their agents' sole authority was to obtain proposals for policies, and that they had no authority to make contracts on behalf of the company, but the plaintiff obtained a verdict and judgment for the full amount. The case then came on appeal to the Divisional Court, where this decision in his favour was upheld, Phillimore J. thus disposing of the contention by the company, that their agent had no authority to make the representation alleged: "No doubt, he had no authority to make a fraudulent misrepresentation; but that is not enough, because if it was within the scope of his authority to make representations at all with the view of procuring a policy or a renewal of premiums, then, according to the decision in *Mackay* v. *Commercial Bank of New Brunswick* (2), if in the course of the exercise of that authority he made a false representation, his principals would have to make it good. Mr. Manisty says, however, that in this case the agents were only employed to act for the defendants for particular purposes, and that in making the statements that they did they were acting outside the scope of their employment, so that they ought to be treated for the present purpose as strangers to the defendants. But I think that this contention cannot be supported. If a principal appoints a person as his agent to obtain bargains, any representation which the agent makes with the object of obtaining a bargain, and which results in a bargain being obtained, is one which the principal must make good in the sense that he cannot retain any benefit which the agent may have procured for him by means of that representation if it turns out to have been untrue." By "untrue" he plainly meant untrue to the knowledge of the person making it. As Bray J. puts it in his judgment, "what we decide is that the defendants cannot keep the premiums which the plaintiff was induced to pay by the fraud of the agent."

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(1) [1907] 2 K. B. 242.

(2) L. R. 5 P. C. 394.

The defendants again appealed (1), but the decision of the Divisional Court was affirmed, Alverstone C.J. and Sir Gorrell Barnes, President, holding that the misrepresentation was as to an existing fact, the course of business or existing practice of the company, and was made by their agent in the transaction of a particular business for which he was employed; while Buckley L.J. says:—"It is well established by authority that a principal cannot retain a profit made by the fraud of his agent, whether the principal authorized the fraud or not. The ground upon which I think the plaintiff is entitled to recover here is: that by the fraud of the defendants' agent she was induced to pay them sums of money which are now in their pockets, and are profit derived by them from the fraud." The case ultimately reached the House of Lords, where it was finally and summarily disposed of in favour of the plaintiff (2), her counsel not being called upon, and the report stating:—"Lord Loreburn L.C., without giving any reasons, moved that the appeal be dismissed. The Earl of Halsbury, Lords Ashbourne, Macnaghten, and James of Hereford silently concurred." But in the course of the arguments by the defendants' counsel they were asked by Lord Loreburn L.C., "Do you really contend that the principal can keep the money obtained by the fraud of the agent?"—a question which the reporter quaintly endorses by a quotation from *Hamlet*: 'Can one be pardon'd and retain the offence?'"

The cases I have quoted are but a few of the numerous decisions in which this principle has been established, and I doubt if in the history of our law there has been any proposition which has been more universally recognized, at least down to the year 1913. Mr. Dickie has, however, contended on behalf of the defendants that this long line of authority must now be considered as if not expressly, at least impliedly, overruled by the case of *Sinclair* v. *Brougham*, *In re Birckbeck Permanent Benefit Building Society* (1), in which it was held that depositors who had entrusted their money to the society on loan, in the course of the business of bankers, which was carried on by the society, but was ultra vires on its part, could not on the liquidation of the society recover their deposits as money had and received, the loans having been received into the assets of the society and applied in the general administration of its business, with the result that they were incapable of identification under a tracing judgment. This decision was shortly afterwards applied in the case of *Leslie, Ltd.*, v. *Sheill* (2), in which it was decided by the Court of Appeal that a plaintiff could not recover money lent to an infant, even though the loan had been induced by the fraudulent misrepresentation of the infant that he was of full age, that the cause of action however framed was in substance ex contractu, and that the plaintiff had no claim either legal or equitable to the recovery of the money. Mr. Dickie has suggested that the judgments of the Divisional Court in this present case were founded upon these decisions which were cited in argument, but I am wholly at a loss to understand what bearing they have upon the question before us, or how they weaken or impugn the elementary principle which prevents a party to a contract which has been induced by the fraud of his agent from retaining any money which he has received under it. In each of the cases referred to the claim was for the enforcement of a contract of loan which in the one case was ultra vires of one of the contracting parties, while in the other it was illegal by reference to the status of the borrower, and they decide nothing more than that in such cases the remedy by action for money had and received has no application. So utterly remote were they in principle from the proposition involved in this appeal that neither in argument nor in any of the elaborate judgments in either case is there to be found the slightest reference to it, or the least expression of dissent from any of the numerous authorities which establish it. Since the decisions in *Sinclair* v. *Brougham* (1) and *Leslie* v. *Sheill* (2) several cases not cited in argument before us have arisen, in which the English Court of Appeal has reaffirmed the principle in *British Workman's and General Assurance Co.* v. *Cunliffe* (3) without the least suggestion on the part of counsel or Court that it had in any degree been affected by these other cases upon which Mr. Dickie has relied. In *Tofts* v. *Pearl Life Assurance Co.* (4) the plaintiff had in 1902 been induced to effect two policies with the company by the fraudulent representation of its agent that he had an insurable interest in the life of the person insured. He paid the premiums under these policies down to the year 1912, when he brought his action for rescission and recovery of the premiums. In the interval the Assurance Companies Act, 1909, was passed, and it was contended on behalf of the company that by sect. 36, sub-s. 2, the representation as to insurable interest was made valid. The Court of Appeal, however, consisting of Buckley, Phillimore, and Pickford L.JJ., held that whether the Act did or did not validate the policies, it did not deprive the plaintiff of his right to have the policies set aside for fraud, and the premiums repaid.

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(1) [1908] 1 K. B. 546.

(2) [1909] A. C. 243.

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(1) [1914] A. C. 398.

(2) [1914] 3 K. B. 607.

Finally, there is the important authority of *Hughes* v. *Liverpool Victoria Legal Friendly Society* (5), in which it appeared that one Thomas had in the years 1908 and 1909 effected five policies on the lives of others. Shortly afterwards he determined to have these policies dropped, and burned them, ceasing to pay the premiums. In 1910 an agent of the defendants brought five duplicate policies to the plaintiff, a woman, who had no insurable interest in the lives in question, and induced her to take up the policies on the fraudulent representation that by paying up the arrears due on premiums and keeping them up everything would be all right. The plaintiff, on discovering that the policies were illegal and void, sued for the recovery of the premiums paid by her.

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(1) [1914] A. C. 398.

(2) [1914] 3 K. B. 607.

(3) 18 T. L. R. 425.

(4) [1915] 1 K. B. 189.

(5) [1916] 2 K. B. 482.

The action was tried before Scrutton L.J. with a jury, when certain questions were submitted to and answered by them, including a finding that the effecting of the policies was induced by the fraudulent representation of the agents of the defendants, that by paying the arrears due and keeping up the premiums everything would be all right. Scrutton L.J., on further consideration, held that even if the policies had been obtained by fraudulent representation, the plaintiff could not recover, as the Assurance Companies Act, 1909, sects. 23 and 36, sub-s. 3, had prohibited under a penalty the issue of such policies. Upon appeal this decision was unanimously reversed by a Court consisting of Swinfen Eady L.J., Phillimore L.J., and Bankes L.J. Swinfen Eady L.J. in his judgment points out that the answers of the jury amount to a finding that the agents of the defendants fraudulently represented that the plaintiff could recover in law on the policies, so that the society by their agents had made representations which led the plaintiff to believe that the policies were valid and effectual in law. He cites with approval the authority of *British Workman's and General Assurance Co.* v. *Cunliffe* (1), and the judgment of Collins M.R. in *Harse* v. *Pearl Life Assurance Co.* (2), adding that the facts of the case before him afford much stronger evidence of fraud than the facts in *Cunliffe's Case* (1). It is important to notice that he ignores altogether the argument on behalf of the defendants, based upon the conclusion that the agents exceeded their authority, from which it is to be inferred that he considered it irrelevant upon the facts before him. Phillimore L.J. was also of opinion that the case was determined by the authority of the decisions in *Cunliffe's Case* (1) and *Harse's Case* (2), adding as to the latter that the principles enunciated by Collins M.R., and argued by the Lords Justices, carried the plaintiff home. He then deals with the argument that the acts of the agents were beyond the scope of their authority, and could not bind the defendants, and says: "But if the society repudiates the bargain, it cannot keep the premiums. This was settled in the House of Lords in *Kettlewell's Case*" (3). Bankes L.J., in his judgment, says: "Given fraud, the authorities seem to me to be all

(1) 18 T. L. R. 425.
(2) [1903] 2 K. B. 92.
(3) [1909] A. C. 243.

one way—namely, that an innocent plaintiff is entitled to say he is not in pari delicto with the defendants, whose agents, by a false and fraudulent representation, induced him to believe that the transaction was an innocent one, and one which was enforceable in law." These important judgments, coupled with the observations of Collins M.R., establish beyond question that an insurance company is not entitled to retain as against the insured the premiums that he has paid under a policy which he has been induced to effect by the fraudulent representation of the agent of the company, even though such representation amounts to a misstatement of law, or involved his principal in an obligation which he was by law prohibited from performing. Every line in these judgments is at variance with the reasoning and conclusion of the judgments of Gibson and Gordon JJ., and completely disposes of the suggestion that a principal is entitled to retain the profits of a contract induced by the fraudulent representation of his agent, in any case in which the representation involves the doing of an act which was illegal or ultra vires on the part of the principal.

In the present case the primary duty of the agent was to make representations to possible clients as to the benefits they would receive under a policy with his principal, and even though his representation involved the doing of an act which was illegal, or ultra vires on the part of his principal, he was nevertheless acting within the scope of his authority in making it, in so far at least as to deprive his principal of the right to retain any benefit under it. This principle has been so uniformly and repeatedly affirmed, and is so consonant with elementary justice, that I should have been content to affirm it sub silentio; but as the judgments in the Divisional Court would subvert it, I have thought it right to consider it fully, lest the slightest doubt should appear to rest upon it. We must reverse the order of the King's Bench Division, and restore the decree of the Recorder, as affirmed on appeal by Moore J., with costs to the appellant both here and in the Court below.

RONAN L.J.:—

I agree with the judgment of the Lord Chancellor and his review of the authorities. I wish specially to express my concurrence with his statements as to the radical distinction between the operation of the doctrine of ultra vires on promise and its operation on a representation, as distinguished from a promise, as to an existing fact. I confess I do not understand the meaning of an ultra vires false statement of an existing fact. Is there anything to prevent any company from making any statement as to an existing fact? The consequences of the statement, if false, are another matter. But how the statement itself can be ultra vires, I fail to see.

I have had much difficulty in following the judgment of Gibson J., in consequence of the mixing up of these two totally different things. He opens his judgment with the words: "The action was for false and fraudulent representation—really a promise." If it was only really a promise, there would be no representation. It is a promise, and in form only a promise; but it involves a representation of fact, and possibly of law. And it is with the involved representation alone we are concerned in this appeal. Qua promise, the statement had no legal operation; as such, it was ultra vires as regards the defendants. He says, for instance: "The contract or representation alleged was admittedly contrary to the statute of 1896." The statute destroyed the contract; it simply showed that the representation was false. Again, he says: "What fraud? Is merely to promise that the loan would be made when the society was disabled from fulfilling the promise or representation . . . the complete abence of authority in the canvasser to make the representation or give the undertaking?" The doctrine of ultra vires made it impossible for the society to authorize him to give the undertaking. It in no way prevented them from in fact authorizing him to make the representation; it made the representation false, that was all.

I have also had much difficulty in distinguishing the Judge's statements of the arguments of the defendants' counsel and the statement of his own views. The second, fourth, fifth, and sixth paragraphs of his judgment seem to me to be statements of the arguments of counsel. Par. 1 is introductory. This only leaves Pars. 6 and 7 for his own views. Par. 6 is based entirely on the view that the representation was not within the scope of the agent's authority. Par. 7 seems to me similar. "Can the fact that the money has been paid on misrepresentation as to the contractual capacity of a statutory corporation make a difference. Even if it might, a misrepresentation by an unauthorized person could not enable money to be got back." ... "The society ... cannot as such perpetrate fraud, and if it theoretically could, it cannot be made responsible in damages for acts of persons without authority." It seems to me that this absence of authority forms the real basis of his judgment. As to the last passage, I may here say that in *Houldsworth* v. *City of Glasgow Bank* (1), Lord Selborne points out, at p. 326, that the liability of a corporation for the frauds of agents depends, "not on the ground of any imputation of vicarious fraud to the principal," but on the grounds stated by Willes J. in *Barwick's Case* (2).

The only passage on the same subject (representation and ultra vires) in the judgment of Gordon J. is open to the same observations: "The society would have had no power to do what the agent undertook [contract], and the agent had no power to make such a representation on behalf of the society. That representation was altogether ultra vires." If the Judge meant by "such a representation" an undertaking or contract to make the loan, it would be quite correct, but irrelevant as to the effect of a false statement of an existing fact. I think there must be some error in the report of the subsequent part of the judgment, for as it reads it makes the Judge decide that but for the absence of rescission by the plaintiff he would be entitled to succeed in the action.

I shall now deal with the case, and avoid, as far as possible, repeating what has been said by the Lord Chancellor. The civil bill in this case is as follows:—"£7 5*s*. 10*d*., money paid on foot of an endowment policy entered into on the false and fraudulent representations of the defendants' agent." Pleadings are not regarded with any severity in the Civil Bill Court.

I agree with Gibson J. that the action may be treated as an action for damages for fraudulent misrepresentation, or as an action

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(1) 5 A. C. 317.

(2) L. R. 2 Ex. 259.

Appeal.
1919.

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Ronan L.J.

for a return of the money on the basis of rescission on the ground of misrepresentation. As to restitutio in integrum, there is nothing for the plaintiff to return, and there is clear repudiation of the policy. I shall treat the case mainly as an action for damages for fraudulent misrepresentation. If this is established, the plaintiff succeeds, and, indeed, the proof of this practically involves all the other grounds of relief.

Mr. Justice Moore tells us that he was about to affirm the decree of the Recorder when he was asked to state a case. The substantial question is: Was he entitled to affirm the decree on the evidence? What is the substance of the matter? The defendants sent an agent to the country to induce people to take out their policies and pay him premiums for them. The plaintiff said the agent made certain representations to him, and thereby induced him (*a*) to agree to take out a policy, and (*b*) to pay him £7 5*s*. 10*d*. This the agent remitted to the defendants, who claim to retain this sum obtained by the representations of their agent. The case states that "the agent represented to the plaintiff that if he insured and took out an endowment policy in the said society, he would obtain an immediate loan of £100 without security." It was that he "would" obtain, not "might" obtain. In my opinion, Moore J. was quite justified in describing it as "Gaughran's misrepresentation that plaintiff would be entitled to an immediate advance without security." It is unnecessary to go so far. It is sufficient to say that it was substantially a representation that the society were ready and willing to make the immediate advance if he paid the £7 5*s*. 10*d*. and took out the policy. The policy imposed no obligation on the plaintiff to make any further payments unless he wished to keep it up by paying the subsequent premiums.

There was no mention of or reference to the powers of the company, but of course a representation that the plaintiff might obtain the loan would only involve a statement that the society had power to make it. The representation that Moore J. has found involved this, but it involved the further statement that they were prepared to exercise the power by granting the loan. In my opinion both were misrepresentations of fact. It was argued (*a*) that the misrepresentation of the powers of the society was only a misrepresentation of law; and (*b*) that the plaintiff could have ascertained by examining the documents constituting the society and the Act of 1896 that the representation as to the power of the society was false. As to (*a*), in my opinion the statement that the society had power to make the immediate loan was a statement of fact, though its truth was to be ascertained from the language of the statute and other documents. As to (*b*), it has been held over and over again that in a case of fraudulent misrepresentation it is no answer to say that the party could have ascertained the falsehood of the representation. Having regard to the findings of Moore J. as to this part of the case, and to the position of the parties, it would be gross injustice to hold that the plaintiff was precluded from relief on this ground. Apart from this, however, the law is clear on this subject. No case was ever more carefully considered than *Derry* v. *Peek* (1). There the misrepresentation was as to the powers of the company. The powers were contained in a statute.

The entire representation in this case was admittedly false. The law is that the principal is in certain cases responsible for the fraud of the agent. The first step, therefore, is to establish the fraud of the agent. Was the representation fraudulent on the part of Gaughran; or rather was there evidence from which Moore J. was justified in inferring that it was? Did he make the representation (*a*) believing it to be true; or (*b*) knowing that it was false; or (*c*) recklessly ignorant whether it was true or false? Gordon J. says in the Court below: "On the facts it is very difficult to come to the conclusion that any sane and sensible man would have believed a representation if made by the defendants' agents that immediately on taking out of the policy the society would lend £100 without any security save that of the policy." This is his inference from the nature of the representation itself. If this were so in the case of the poor railway porter, is it not still more difficult to believe that the agent of the company, who I presume was "a sane and sensible man," could have believed it? It is right to say that Gordon J. does not suggest that the representation was not fraudulent on the part of Gaughran. Curiously enough, he does not deal at all with what I regard as the first vital question in the case, viz., was the agent guilty of fraud? Gibson J. deals with it, but does not decide it. He says towards the end of his judgment, paragraph 6 (ante, p. 18): "The canvasser may have been possibly liable as a wrongdoer or may have warranted his authority. . . . The society took the money as currency from one who, if he was guilty of fraud, was not their agent in reference to such fraud." It is clear that the only ground on which the canvasser could have been liable as a wrongdoer was that he had made a fraudulent misrepresentation; this was the only fraud he was guilty of.

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(1) 14 App. Cas. 337.

In the early part of the judgment he says: [his Lordship read the paragraph of Gibson J.'s judgment (ante, p. 16) commencing "As the case describes."] I must express my entire dissent from this. The agent's fraud can be found in his statement that the society would make the loan described, which he could not have believed to be true. It must have been at least such a recklessly false statement as the law deems fraudulent. It shows that the entire statement, including the implied allegation of the society's power to make the loan, was fraudulent in point of law. It was not necessary to prove actual knowledge on his part that the society was incapable of making the loan described by him to the plaintiff: see *Derry* v. *Peek* (1). "If persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must in a civil point view be held as responsible as if they had asserted that which they knew to be untrue": *Reese River Silver Mining Company* v. *Smith* (2), per Lord Cairns, at pages 79–80. Sir F. Pollock, in the 1916 edition of "Torts," pages 305–6, quotes this as being now classical, adding that it states the principle applicable to an action for deceit. In a foot-note he says: "Even Lord Bramwell allows Lord Cairns' dictum": *Derry* v. *Peek* (3). These being the facts and this the law, surely there was ample evidence to justify Moore J. in finding that Gaughran was guilty of fraudulent misrepresentation. I agree with Gibson J. that it is not necessary to send the case back to Moore J. for a formal finding that Gaughran was guilty of fraudulent misrepresentation. I think Gordon J. has demonstrated in the passage quoted that there was ample evidence to justify Moore J. in so finding, as I think he did so find.

So far I have dealt with the question of fraud on the assumption that Gaughran, the agent, was the defendant, but there is

(1) 14 A. C. 337. (2) L. R. 4 H. L. 64. (3) 14 A. C., at p. 351.

a vital distinction where the principal is the defendant. Assume, 1, that the representation was only that plaintiff might obtain the loan, i.e., that the defendants had power to grant it; 2, that Gaughran bonâ fide believed this to be true, and that Moore J. had so found; 3, that the representation was within the scope of Gaughran's authority. *Pearson & Sons, Ltd.*, v. *Dublin Corporation* (1) (an action for fraudulent misrepresentation) is a conclusive authority that on these facts the defendants here would be liable in an action for fraudulent misrepresentation, as they, of course, knew that they had no power to make such a loan. It is only necessary to read the concluding passage of Lord Halsbury's judgment at pp. 358, 359, where he says:—"It matters not in respect of principal and agent (who represent but one person) which of them possesses the guilty knowledge, or which of them makes the incriminating statement. If between them the misrepresentation is made so as to induce the wrong, and thereby damages are caused, it matters not which is the person who makes the representation, or which is the person who has the guilty knowledge." This was adopted and acted on by Palles C.B. in *Malone* v. *Belfast Bank* (2).

The next question is: Are the defendants liable for the agent's fraud? The principle is stated in Mr. Justice Willes' celebrated judgment in *Barwick* v. *English Joint Stock Bank* (3):—"The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be found . . . In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of act, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in."

What was the agent employed to do here? To induce people to insure with the defendants, by telling them the benefits to be derived from so doing. Can there be any doubt that the representations he made to the plaintiff were directly made "in the course of the defendants' business," in the course of the service? What was "the class of acts" he was authorized to do? "To make representations." There is a simple test: If the representation had been true, would not it have been clearly within the scope of his authority? This matter depends on the nature of the representation as distinguished from its truth or falsehood. Is a statement of the rights that the plaintiff would acquire by insuring, outside the class of statements he was authorized to make?. Suppose it was true that the policy would entitle the plaintiff to the immediate loan, would it be outside the scope of the agent's authority to tell him so in order to induce him to insure? Surely not. It would be the very thing, it would be his duty to tell him; and, therefore, the representation, apart from its falsehood, would be within the scope of the authority. An agent induces a man to insure by telling him that the society have done, or was prepared to do, a certain thing. This is false in fact and fraudulent :—A, If the thing is one that the society had power to do, they are liable for the agent's fraud ; B, If it is one they had not power to do, this relieves them from liability, and they retain money obtained for them by this fraud of the agent, for which he alone is liable. This seems substantially the main contention of the defendants, as appears from the judgments in the Court below. If B is correct, the general rule that a company is liable for the frauds of their agents in the course of their business should be followed by excepting the case where the fraud of the agent consists of a representation involving a misstatement of the powers of the company, e.g., that they have done or are prepared to do an act. In my opinion there is no foundation in principle or authority for such an exception, and no authority has been cited for it.

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(1) [1907] A. C. 351.

(2) [1912] 2 I. R. 187, at p. 206.

(3) L. R. 2 Ex. 259, at pp. 265-6.

It will be remembered that in *Barwick's Case* (1) Willes J. held it to be a condition of the principal's liability that the agent must have been acting for his benefit. I did not comment on this at the time, because that is no longer law; but it was law at the date of the two cases I am now about to refer to, and they were decided on it. Both these cases were decisions that this condition was essential, but in *Lloyd* v. *Grace Smith & Co.* (2) the House of Lords reversed the decision of the Court of Appeal, and held that the judgment of Willes was to be varied by omitting the condition that the agent was acting for the benefit of the master. It is, therefore, immaterial in this action. No case was cited in which any such question was raised. Since the argument I have found two cases which seem directly in point. In *The British Mutual Banking Co.* v. *Charnwood Forest Railway Co.* (1) the defendants' secretary told the plaintiffs that certain transfers of certain stock were valid, and that the stock existed. The company had no power to create the stock in question, as they had exhausted their powers in that respect, and the creation of any such stock was ultra vires. The representation was, therefore, that the company had power to create the stock, which would have been ultra vires. However, it was proved 1, that the secretary made the representation for his own benefit only; and 2, not for the benefit of the company, that the defendants derived no benefit from the transaction. In the King's Bench Division, Manisty and Mathew JJ. gave judgment for the plaintiff. The defendants appealed. Sir R. Finlay and the late Mr. Justice Sutton argued the case for the defendants. They rested the case solely on the two matters I have just mentioned. I shall read a few passages from the judgments. Lord Esher says: "The rule has often been expressed in the terms that to bind the principal the agent must be acting 'for the benefit' of the principal. This, in my opinion, is equivalent to saying that he must be acting 'for' the principal, since, if there is authority to do the act, it does not matter if the principal is benefited by it. I know of no case where the employer has been held liable when his servant has made statements not for his employer, but in his own interest"; and Bowen L.J. says: "The expression that the secretary was placed in his office to do acts of 'that class' begs the very question at issue, for the defendants' proposition is, on the contrary, that an act done not for the employer's benefit, but for the servant's own private ends, is not an act of the class which the secretary either was or could possibly be authorized to do." The Court decided the case on this ground. Twenty-four years later, in *Lloyd* v. *Grace Smith & Co.* (2), Farwell L.J. thus dealt with that case: "The question of estoppel was not discussed by Lord Esher, but the two Lords Justices disposed of it on the ground that the company could not give itself greater powers than it had by representation and estoppel . . . . It was considered that estoppel by representation did not enlarge the company's powers, and this is no doubt correct; but it does not follow that the company cannot be held liable for the misrepresentation; the stock which was beyond their power to create could not be created by estoppel, but they could and would now be held liable for damages for the representation of their agent within the scope of his authority that such stock had been created." This seems to me conclusive in the present case.

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(1) L. R. 2 Ex. 259.

(2) [1912] A. C. 716.

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(1) 18 Q. B. D. 714.

(2) [1911] 2 K. B. 489, at pp. 511–12.

There was some doubt expressed in the *Charnwood Case* (1) as to whether in an action for deception against a company any damage could be recovered beyond the benefit the company derived from the fraud of the agent. Farwell L.J. referred to *Balkis Consolidated Co.* v. *Tomkinson* (2) for the statement by Lord Herschel that a company can always pay damages for a wrong for which they are liable. This explains the word "now" in the final passage I have read. It is a clear specific authority that an action for deceit lies against a company for a false statement by an agent that they had done an act which was ultra vires. Surely it would equally lie for a statement that they were prepared or ready and willing to do such an act, or that they had power to do it.

I am therefore of opinion that plaintiff can recover the money obtained by the defendants by the fraudulent misrepresentation of their agent.

O'CONNOR L.J. :—

I agree. The defendants employed an agent to solicit orders for insurance policies, and for that purpose to make statements as to the nature of these policies. The agent, in the course of his business, made a lying statement to the plaintiff as to the nature of the policy. The plaintiff was induced by the lie to order a policy. The defendants got his money, and now want to keep it. In my opinion they cannot do so. This is a clear instance of the rule that a principal cannot retain money obtained by him through the fraud of his agent.

Solicitors for the appellant: *Gerald Byrne & Co.*
Solicitor for the respondents: *J. W. Downey.*

C. L.

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(1) 18 Q. B. D. 714.

(2) [1893] A. C. 396.

R. (BARHAM) *v.* LEITRIM COUNTY COUNCIL AND THE TREASURER THEREOF (1).

K. B. Div.
1919.
Nov. 25, 26.

Criminal injuries—Criminal Injuries (Ireland) Act, 1919 (9 *Geo.* 5, *c.* 5)—*Scope of Act—Injury to persons—Payment of amount awarded.*

The Criminal Injuries (Ireland) Act, 1919 (9 Geo. 5, c. 5), applies only to injuries to persons, and not to injuries to property.

MANDAMUS.

Application to make absolute a conditional order for a writ of mandamus directing the Northern Banking Co., Ltd., the treasurer of the County Council of the County of Leitrim, out of such moneys as are under its control as such treasurer, or, should these moneys be insufficient, then out of the first moneys coming under its control as such treasurer, forthwith to pay to the prosecutors the sum of £1496 2*s.* 3*d.*, being the amount awarded for compensation, costs, and expenses by Mr. Justice Pim, sitting as Judge of Assize, at Carrick-on-Shannon, on the 6th March, 1919, on the hearing of an appeal by the said council from a decree of the County Court Judge awarding compensation to the prosecutors for the malicious burning and destruction of a sawmill on the lands of Clooncoley, in the parish of Mohill.

It appeared from the affidavits filed in support of the application that the decree was sent to the secretary of the county council on the 21st March, 1919, and that a formal demand for payment was made on the 2nd of October, 1919, by the solicitor for the prosecutors on the manager of the branch of the Northern Banking Co., Ltd., at Carrick-on-Shannon, and that payment was refused.

Denning K.C. and *T. J. Smyth*, for the prosecutors:—

Sect. 1, sub-s. 4 (2), of the Criminal Injuries (Ireland) Act, 1919, gives the Court power to grant the order of mandamus

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(1) Before MOLONY C.J., and DODD and MOORE JJ.

(2) Sect. 1, sub-s. 4, of the Criminal Injuries (Ireland) Act, 1919, is as follows:—" Where a decree is made against a county council under this Act or under any of the enactments relative to compensation for criminal injuries, the amount recovered against the county council shall be payable by the council on demand, and the amount thereof may be enforced under sub-s. 1 of sect. 80 of the Local Government (Ireland) Act, 1898, whether the amount has or has not been raised or levied."

K. B. Div.
1919.

R.
(BARHAM)
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LEITRIM
CO. COUNCIL.

sought for. This Act applies to injuries to property as well as to injuries to persons. It did not alter the status of the parties, but gave a new method of procedure. The rights of the parties are ascertained when the county council is decreed, and these rights are to be enforced according to the new method of procedure. They referred to *Gardiner* v. *Lucas* (1).

Leonard K.C. and *Webb*, for the Leitrim County Council:—

The Criminal Injuries (Ireland) Act, 1919, does not apply to injury to property. All the sub-sections of sect. 1 are governed by the opening words of the section, which limit its operation to compensation to persons maimed and to the representatives of persons murdered. Where the word "injury" is used it is an epitome of the phrase "murdered, maimed, or injured" in the first sub-section, and means "injury to the person" only. Further, the Act is not retrospective, and as the decree in this case was made before the Act received the Royal assent, it does not apply: *Bourke* v. *Nutt* (2); *R.* (*Vance*) v. *Dublin Corporation* (3); *R.* (*Heuston*) v. *Wicklow County Council* (4).

Wylie K.C. and *Overend*, for the Local Government Board.

Finlay, for the Northern Banking Co., Ltd.

MOLONY C.J. [His Lordship stated the facts as given above, and proceeded]:—

The prosecutors contend that under the provisions of sect. 1, sub-s. 4, of the Criminal Injuries (Ireland) Act, 1919, they are entitled to the writ of mandamus, while on the part of the county council it was argued that the Act does not apply to cases of injury to property; and that even if it did, it is not retrospective, and cannot apply in this case, where the decree was made on the 6th of March, 1919, while the Act did not receive the Royal assent until the 16th of April, 1919. It was further contended that a mandamus, if given, should be confined to directing payment out of moneys applicable thereto, and should not impose a liability on the treasurer to pay money which had been raised for and specifically and legally appropriated to other necessary purposes.

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(1) 3 A. C. 603.
(2) [1904] 1 Q. B. 725.
(3) 40 I. L. T. R. 57.
(4) [1908] 2 I. R. 218.

I am of opinion that the Act only applies to injuries to persons, and has no application whatever to injuries to property. This results from a careful consideration of the provisions of sect. 1 of the Act. Under sect. 1, sub-s. 1, the provisions of the Criminal Injuries Acts, with respect to the compensation of persons maimed and of the representatives of persons murdered in certain cases, are subject to the modifications made by the section, extended so as to apply to certain cases therein mentioned.

The Criminal Injuries Acts are defined by sub-sect. 7 to mean the enactments specified or described in Part I of the first schedule to the Local Government (Ireland) Act, 1898, and it seems to me to be clear that the scope of the Act was limited to making modifications in the provisions of the Criminal Injuries Acts in so far only as they dealt with compensation to persons maimed and to the representatives of persons murdered. The first extension applies where a Judge, magistrate, police constable, has been "murdered, maimed, or maliciously injured in his person in the execution of his duty or on account of his being, acting, or having acted as a Judge, magistrate, police constable," and the second extension is where any other person has been murdered, maimed, or maliciously injured in his person, and the murder, maiming, or injury is a crime arising out of any combination of a seditious character or any unlawful association.

Sub-sect. 2 provides that the application for compensation may be made within three months after the murder, maiming, or injury, or, where the murder, maiming, or injury occurred before the passing of the Act, within three months after the passing of the Act, and it cannot be doubted that the word "injury" in this sub-section refers only to injury to the person.

Sub-section 6 provides that the section shall not apply except where the murder, maiming, or injury occurred on or after the 1st day of January, 1917, and this sub-section is a strong confirmation of the view that the injury complained of must be an injury to the person.

I am of opinion that from beginning to end of the section there is not anything which gives support to the contention on the part of the prosecutors that the section was intended to deal with compensation for malicious injuries to property as well as compensation for persons maimed and the representatives of persons murdered.

The prosecutors say that sub-sect. 4 shows that the Act was intended to apply to all decrees for criminal injuries, because it uses the words, "where a decree is made against a county council under this Act, or under any of the enactments relative to compensation for criminal injuries." This sub-section, however, is governed by the opening words of sect. 1, sub-sect. 1, which in my opinion limit the operation of sub-sect. 4 to compensation to persons maimed and to the representatives of persons murdered, and I think that the words referred to were intended to bring within the operation of the present section cases of injury to persons which were provided for by the previous statutes, such as certain provisions of sect. 106 of the Act 6 & 7 Wm. 4, c. 116.

Section 1, sub-sect. 4, of the Act of 1919 is as follows. [His Lordship read the sub-section]. It was contended that this sub-section is retrospective and applies to a decree made before the passing of the Act, and that the words "is made" in the sub-section are to be treated as meaning "where a decree has been made either before or after the passing of this Act." There is no doubt that if the word "is" gets its ordinary and natural meaning the section could not apply retrospectively, and the duty of the Court is to give the word its ordinary meaning unless such a construction would lead to an absurdity.

The present case is, I think, analogous to the case of *Bourke* v. *Nutt* (1), which was relied on by the county council. That case arose under the 32nd section of the Bankruptcy Act, 1883, which provided that "where a debtor is adjudged bankrupt," he shall be subject to certain disqualifications, and it was held by the Court of Appeal that the section had not a retrospective operation. There it was contended that the words "is adjudged bankrupt" should be read "has been adjudged bankrupt either before or after the passing of the Act," just as here it has been contended that the words "where a decree is made" should be read "where a decree has been made either before or after the passing of this Act."

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(1) [1904] 1 Q. B. 725.

It was submitted in opposition to the application that, even if the Act extended to injury affecting property, and was retrospective in its character, the prosecutors would not be entitled to a mandamus in the form which was sought here, and that the section did not authorize payment of a judgment debt of the council out of funds devoted by law to wholly different purposes. In support of this contention, reference was made to the judgment of Palles C.B. in *The King* (*Vance*) v. *The Corporation of Dublin* (1), and to the judgment of Gibson J. in *The King* (*Heuston*) v. *Wicklow County Council* (2); but, in the view which I take of this case, it is unnecessary to pronounce any opinion upon this matter.

Dodd J.:—

I concur. The ground of the decision is that the applicant here is not within the Criminal Injuries (Ireland) Act, 1919. I read the word "injury" in sect. 1, sub-s. 6, as being injury to the person, for the reasons given by my lord. And I am further of opinion that the order to the county treasurer having been delivered to him before the passing of the Act, even if the word "injury" were to include malicious injury to property, was spent before the Criminal Injuries (Ireland) Act, 1919, came into operation again for the reasons given by the Lord Chief Justice.

I desire to add a word or two as to what we do not decide.

We do not place a judicial interpretation on the words in sect. 1, sub-s. 4, "whether the amount has or has not been raised or levied," the applicant here not having a locus standi to have it decided. Speaking for myself, it would take a good deal of argument to persuade me that these words made the compensation a first charge on any funds in the hands of the treasurer raised or levied for other purposes, and if Mr. Smyth's argument that this section applies to all compensation for malicious damage to property be sound, there would be still more difficulty. It would repeal all the statutory provisions requiring moneys raised by a county council to be applied to the purposes for which they were raised,

(1) 40 I. L. T. R. 57.

(2) [1908] 2 I. R. 218.

and would, as Mr. Smyth says it was intended to do, overrule a whole series of authorities, ending with *R.* (*Bennett*) v. *County Council of King's County* (1). But the matter is not involved in the decision of the Court.

Similarly, we do not decide whether the power given by the Criminal Injuries (Ireland) Act, 1919, to exempt from levy any specified hereditaments within the area, extends to a decree for malicious injury to property.

It may be that the solution of these two matters follows as a corollary from our decision in this matter. But I have the authority of Lord Halsbury that the House of Lords itself is not obliged to decide what seems to follow as a corollary from a decision of the House.

Moore J.:—

I have had the advantage of reading the judgment which has just been delivered by my lord. I concur, and have nothing to add.

Solicitor for the prosecutors: *R. A. Corscadden.*
Solicitor for Leitrim County Council: *Joseph Delany.*
Solicitor for the Local Government Board: *J. Mecredy.*
Solicitor for the Northern Banking Co., Ltd.: *J. A. Pettit.*

H. H.

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(1) [1908] 2 I. R. 179.

BRADSHAW *v.* M'MULLAN (1).

Appeal.
1918.
Dec. 2, 3, 4.
1919.
Jan. 22.

Landlord and tenant—Rates—Poor-rate—Liability for Poor-rate—Lease at a rent "including rates and taxes"—Indemnity—Deduction—Estoppel—Res judicata—Local Government (Ireland) Act, 1898 (61 & 62 *Vict.* c. 37), *sect.* 52, *sub-s.* 2.

By a proposal in writing, dated the 1st December, 1908, and subsequently accepted, M. agreed to take from B. certain business premises for a term of thirty-one years, at the yearly rent of £240, "including all rates and taxes as at present existing or assessed on said premises," and M. further agreed to pay five-sevenths of all future or increased taxation caused by alterations or improvements stipulated for in the agreement.

In an action for rent by B. against M., in which M. claimed credit for the amounts of poor-rate paid by him,

Held, by the Court of Appeal, affirming the decision of the majority of the King's Bench Division, that the contract was one of indemnity by the landlord against the poor-rate, and not a contract respecting deduction by the tenant from his rent of any part of the poor-rate, and consequently that the contract was not rendered void by sub-s. 2 of sect. 52 of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37) (2).

Appeal.

The action was one to recover the sum of £140, being seven months' rent of premises at Bachelors' Walk, Dublin, held by the defendant from the plaintiff under an agreement for a lease, dated the 1st January, 1909. The agreement was for a term of thirty-one years, at the yearly rent of £240, "including all rates and taxes as at present existing or assessed on said premises," the defendant agreeing "to pay five-sevenths of all future or increased taxation caused by the alterations or improvements hereinafter stipulated." The defendant also agreed to expend the sum of £400 on certain improvements, which he did. Subsequently the valuation of the premises held by the defendant was raised to £109, the defendant being rated as occupier, and for some years he paid the rates, and was allowed credit therefor in the rent accounts. In the year 1913 the rent had fallen into arrear to the extent of £500, and by a deed of the 17th September, 1913, the defendant executed in favour of the plaintiff a mortgage of other property to secure the arrears due, with interest. This deed contained a recital that the defendant had paid certain rates and taxes which he was not bound to pay under his lease, and contained a covenant whereby the defendant as mortgagor covenanted to pay the sum of £500, with interest, less any money paid by him in respect of rates and taxes which he was not bound to pay under the lease. A suit was afterwards instituted in the Court of the Master of the Rolls in respect of this mortgage, which involved the taking of an account between the plaintiff and the defendant; and in the course of this suit the plaintiff brought in a memorandum for the opinion of the Judge which contained the following statement:—"The plaintiff, as appears by the affidavits of J. P. Bradshaw, filed on the 10th June, 1914, and 16th December, 1914, contended that the defendant was liable to pay five-sevenths of the taxation on the increased valuation, namely, £75, under the terms of said agreement, or, in the alternative, that the defendant should pay the entire of the poor-rate payable out of the said premises." In the result the Master of the Rolls decided that the increase in the valuation had not been occasioned by the improvements made by the defendant, but was accounted for by general causes, and the account was finally settled on this basis, credit for all rates being allowed to the defendant. Subsequent to the decision of the Master of the Rolls a consent was made a rule of Court in an action for rent in the King's Bench Division, the consent being on the basis that full credit for poor-rate should be allowed to the defendant. In the present action the defendant paid into Court the amount claimed, less by £27 6*s.* 7*d.*, the amount of rates paid by him during the period in respect of which rent was claimed, of which sum only about £9 had been paid in respect of poor-rate.

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(1) In the Court of Appeal, before Molony C.J., and Ronan and O'Connor L.JJ.

(2) Section 52, sub-s. 2, of the Local Government (Ireland) Act, 1898, provides as follow:—

The occupier of a hereditament shall not be entitled to deduct from his rent any part of the poor-rate, and any contract to the contrary respecting such deduction shall be void, subject, nevertheless, to the exceptions in this Act and to the provisions hereinafter contained respecting occupiers under existing tenancies.

Appeal.
1918.
BRADSHAW
v.
M'MULLAN.

By an order of the majority of the Divisional Court, dated the 13th May, 1918 (1), the judgment entered for the plaintiff at the trial of the action was set aside, and judgment entered for the defendant. Hence this appeal.

W. G. Gibson K.C., *W. E. Wylie K.C.* (*M. B. Cooper* with them), for the appellant:—

Our first contention is that this agreement does not affect payment of poor-rate. If it had been so intended, poor-rate would have been mentioned specifically. The parties must be deemed to have known the existing law, and to have contracted with reference thereto. But if the agreement affects the payment of poor-rate, it is to that extent invalid under sect. 52, sub-s. 2, of the Local Government (Ireland) Act, 1898. It clearly involves deduction. In practice the tenant would pay the poor-rate, and would be entitled to a receipt for his rent on producing the receipts for poor-rate, and paying the balance of his rent. The section is not confined to existing contracts: *Haslett* v. *Sharman* (2); *Vernon* v. *Pile* (3). The form of agreement adopted is a mere evasion of the statute, the object of which was to throw the poor-rate on the occupier as a matter of public policy: *Ludlow* v. *Pike* (4); *Tuff* v. *Guild of Drapers of the City of London* (5). The Court is precluded from taking notice of this contract, so far as poor-rate is concerned, and must treat it as having "no effect whatever in law or in equity": *In re London Marine Insurance Association* (6); the illegality cannot be ignored: *Gedge* v. *Royal Exchange Assurance Corporation* (7). That the intention of the parties cannot be carried out, and the result is prejudicial to one of them, cannot affect the issue: *In re Stapleford Colliery Company* (8). In *Canavan* v. *Burton* (9) it was held that in a subletting created by a written document which was inoperative by reason of the landlord's consent not having been obtained, there was no implied covenant for title or quiet enjoyment. *Allen* v. *Carroll* (10) and *Bryans* v. *Callaghan* (11), relied on by the

(1) [1918] 2 I. R. 479.
(2) [1901] 2 I. R. 433.
(3) 35 I. L. T. R. 21.
(4) [1904] 1 K. B. 531.
(5) [1913] 1 K. B. 40.
(6) L. R. 4 Ch. App. 611.
(7) [1900] 2 Q. B. 214.
(8) 14 C. D. 432.
(9) [1900] 2 I. R. 359.
(10) [1911] 2 I. R. 190.
(11) 42 I. L. T. R. 97.

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respondent, were merely decisions of Registration Courts, which investigate questions relating to "actual possession, occupation, or use": the judgment of FitzGibbon L.J. in *Roulston* v. *Kerlin* (1). We do not contend that the action invalidates the entire contract: *Daly* v. *Duggan* (2). There was no estoppel: *Irish Land Commission* v. *Ryan* (3). It has not been shown that there was a decision on the very point at issue: *O'Grady* v. *Synan* (4). If the plaintiff dropped the point during the mortgage proceedings, it is not enough to raise an estoppel: *Brandlyn* v. *Ord* (5). A demurrer was held not to lie to a bill on the ground of res judicata unless it averred that everything that was in controversy in the second suit as the foundation for the relief sought was also in controversy in the first: *Moss* v. *Anglo-Egyptian Navigation Company* (6).

Jellett K.C. and *A. A. Dickie K.C.* (*James Henry* with them), for the respondent :—

Sect. 52, sub-s. 2, of the Local Government (Ireland) Act, 1898, was not intended to affect future contracts. See *Haslett* v. *Sharman* (7). It is in contrast with sect. 71 of the Poor Law Act, 1838, where future contracts are expressly referred to. In any case this agreement is not within the section; it does not provide for deduction of the poor-rate. "Deduction" is a well recognized term in Acts of Parliament, and the Court must construe the section strictly according to the meaning of the term. *Hill* v. *East and West India Dock Company* (8); *Tozer* v. *Viola* (9). The alleged public policy of the section cannot affect the construction: *Hollinshead* v. *Hazleton* (10). If the Legislature had intended to avoid every contract which throws the burden of poor-rate on a landlord, it would have so provided. The appellant has taken advantage of the agreement; the improvements have been made in pursuance of it, and he cannot now repudiate it: *In re Wilson* (11); *Roe* v. *Mutua*

(1) [1908] 2 I. R. 335, at p. 338.
(2) 1 Ir. Eq. R. 311.
(3) [1900] 2 I. R. 565.
(4) [1900] 2 I. R. 602, 610.
(5) 1 Atk. 571.
(6) L. R. 1 Ch. App. 108.
(7) [1901] 2 I. R. 433.
(8) 9 A. C. 448.
(9) [1918] 1 Ch. 75.
(10) [1916] A. C. 428.
(11) [1916] 1 K. B. 382, 393.

Loan Fund (1); *Brooke* v. *Price* (2); *Williams* v. *North's Navigation Collieries* (1889), *Ltd.* (3). We rely on *Allen* v. *Carroll* (4) and *Bryans* v. *Callaghan* (5). This was an agreement for a lease only, and in an action for specific performance of the contract the Court would mould the lease so as not to contravene sect. 52: *Carolan* v. *Brabazon* (6); *Daly* v. *Duggan* (7); *Davies* v. *Fitton* (8). The plaintiff is precluded by acquiescence from now insisting on full payment: *Hewlett* v. *Allen* (9). There is a clear estoppel raised by the proceedings in the Court of the Master of the Rolls. That the very point now at issue was there raised is shown by the memorandum brought in by the plaintiff himself. He cannot now re-agitate the matter. It is immaterial that he gave up the point; the right to rely on the statute was abandoned: *Phillips* v. *Martin* (10); *Wilson* v. *M'Intosh* (11). In *Humphries* v. *Humphries* (12) it was held that the defendant, in an action for rent, was precluded from raising a defence under sect. 4 of the Statute of Frauds, inasmuch as he had not raised this defence in a former action.

Gibson K.C., in reply.

The following cases were also cited:—*Toronto Corporation* v. *Toronto Railway* (13); *Ooregum Gold Mining Company of India* v. *Roper* (14); *Simpson* v. *Nichols* (15); *Davis* v. *Earl of Strathmore* (16); *Fletcher* v. *Birkenhead Corporation* (17).

Cur. adv. vult.

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(1) 19 Q. B. D. 347.
(2) [1917] A. C. 115.
(3) [1906] A. C. 136.
(4) [1911] 2 I. R. 190.
(5) 42 I. L. T. R. 97.
(6) 3 Jones & Latouche, 200.
(7) 1 Ir. Eq. R. 311.
(8) 2 Dr. & W. 225.
(9) [1892] 2 Q. B. 662.
(10) 11 N. S. W. L. R. 153.
(11) [1894] A. C. 129.
(12) [1910] 2 K. B. 531.
(13) [1907] A. C. 315.
(14) [1892] A. C. 125.
(15) 5 M. & W. 702.
(16) 16 Ves. 418.
(17) [1907] 1 K. B. 205.

Appeal.
1919.
BRADSHAW
v.
M'MULLAN.
Jan. 22.

MOLONY C.J.:—

By a proposal in writing dated the 1st December, 1908, the defendant agreed to take from the plaintiff a lease of portion of the premises known as No. 30 Bachelor's Walk, Dublin, for a term of thirty-one years, at the yearly rent of £240, "including all rates and taxes as at present existing or assessed on said premises, but we agree to pay five-sevenths of all future or increased taxation caused by the alterations or improvements hereinafter stipulated." This agreement was duly accepted by the plaintiff, and the defendant entered into possession under it, and paid the rent. It was clearly understood by both parties that, apart from increased taxation caused by improvements, the plaintiff should be liable for all the rates and taxes, including poor rates, payable in respect of the premises, and up to the present time the rent has been settled upon this basis. It is, however, now contended by the plaintiff that, having regard to sect. 52, sub-s. 2, of the Local Government (Ireland) Act, 1898, the agreement entered into by her was illegal, and that she is entitled to recover the entire rent, and, in addition, to cast the liability for poor rates upon the defendant.

Sub-s. 2 of sect. 52 is as follows:—"The occupier of a hereditament shall not be entitled to deduct from his rent any part of the poor rate, and any contract to the contrary respecting such deduction shall be void; subject nevertheless to the exceptions in this Act, and to the provisions hereinafter contained respecting occupiers under existing tenancies."

This sub-section is limited to deductions, and the contract which is declared invalid must be a contract in respect of deductions, and it lies at the root of this case to see what is the precise nature of the contract entered into by the parties.

The defendant wanted to pay a rent of £240 yearly to cover everything, and that he should not be under any liability or in any way asked to pay any rates or taxes in respect of the premises. The plaintiff agreed to these terms. If the defendant was not to pay, the only person to pay was the plaintiff, and undoubtedly the substance and effect of the agreement was that the plaintiff was to indemnify the defendant against paying, or being called upon to pay, any part of these rates and taxes. It was not a right of deduction which the defendant got, but a right of indemnity, and if taxes accrued and were claimed at a time when no rent was due it would have been quite open to the defendant to at once assert his rights to an indemnity as against the plaintiff. I have not been able myself to see any difficulty about this point, and I do not consider it necessary to go through the authorities, which have been so fully discussed in the judgment of Gibson J. in the Court below, further than to say that I agree with the conclusions at which he has arrived, and for the same reasons.

It has been urged upon us, especially by Mr. Wylie, that the policy of the Act was, not merely to impose liability on the occupier for the rates, but to require that he should be the person, and the only person, liable for the rates; and he strongly contended that if it is admitted that the provisions of sect. 52 are not wide enough to cover a contract of indemnity, the object of the Act is defeated. The simple answer to this is that the section is confined to deduction, and does not purport to include indemnity, although a section could easily have been drafted which would have been sufficient to include a case of indemnity. In this connexion it is only necessary to refer to sect. 1, sub-s. 1, of the Tithe Act, 1891, which has been held to prohibit indemnity: *Lord Ludlow* v. *Pike* (1) and *Tuff* v. *The Guild of Drapers of the City of London* (2).

Having arrived at a clear view upon the construction of the contract, it becomes unnecessary for me to decide the question of estoppel; but, if it were necessary, I would have no hesitation in finding that the plaintiff is estopped in the present case, and that there is no legal difficulty in the way of giving effect to that estoppel. When the case was before the Master of the Rolls in the mortgage proceedings the plaintiff brought in a memorandum for the opinion of the Judge, which, after stating the proceedings before the Chief Clerk, continues as follows:—"The plaintiff, as appears by the affidavits of T. P. Bradshaw, filed on the 10th June, 1914, and the 16th December, 1914, contended that the defendant was liable to pay five-sevenths of the taxation on the increased valuation, namely, £75, under the terms of the said agreement, or, in the alternative, that the defendant should pay the entire of the poor rate payable out of the said premises."

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(1) [1904] 1 K. B. 531.

(2) [1913] 1 K. B. 40.

The plaintiff thus raised the question of the defendant's liability in the most precise language, and he had a full opportunity of discussing it before the Master of the Rolls, and having had that opportunity he is not now to be permitted to re-agitate the very same point that was then in issue.

In my opinion this appeal should be dismissed with costs.

RONAN L.J. :—

It has been argued that the proposal, dated the 1st and accepted the 8th of September, 1908, is a lease and not an agreement for a lease. In my opinion it is clearly the latter. It commences: "We propose to take a lease." It contains the following among other passages: "Said lease to contain the usual covenants, including a covenant not to use," &c. "And on the execution of the said lease, which is to be prepared and completed on the 1st of January, 1909, we shall lodge in the names of the lessor and lessees a sum which shall," &c. I am unable to agree with the view of Madden J. that equity would not direct specific performance of this agreement not under seal for a lease by deed with the covenants expressly stipulated for. This being so, I adopt paragraph 5 of the judgment of Gibson J The case of *Carolan* v. *Brabazon* (1) referred to by him is reported in 3 Jones & La Touche, 200. The passage in Fry he refers to is at page 492 of the 5th edition, and is as follows:—"Where a contract is in its original form obnoxious to difficulties on the score of illegality, but can nevertheless be lawfully performed in substance, the Court will so model it as to effectuate its purpose. Thus it having been made by statute illegal to contract for the tenant to pay the tithe rent-charge, or to contract for a lease stipulating that the tenant should pay a certain sum for rent and also the tithe rent-charge, may be carried into effect by the Court by means of a lease reserving as rent the two sums in the contract treated respectively as rent and rent-charge."

Apart from this principle let us see how the covenants in a lease in pursuance of the contract in this case should be framed so as to give effect to the clause providing for the yearly rent of £240, "including all rates and taxes at present existing or assessed on said premises, but we agree to pay five-sevenths of all future or increased taxation caused by the alterations or improvements hereinafter stipulated." Let us take the obligations of the tenant in the first place, and insert A a covenant to pay the said rent of £240 without any deduction; B a covenant "to pay five-sevenths of all future or increased taxation caused by the alterations or improvements hereinafter stipulated." Now these covenants are in the very words of the agreement, except that I have added the words "without any deduction"—a common form in leases to put the meaning beyond doubt.

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(1) 3 Jones & Lat. 200.

Is it not clear that these covenants A and B fully and accurately state the tenant's obligations under the clause? It is plain that these covenants do not give full effect to the clause. It clearly contemplates that there may be two-sevenths of future or increased taxation to be paid in respect of the premises. This must be paid by either landlord or tenant. Can there be any doubt as to which is to pay it? It also mentions "all rates and taxes as at present existing or assessed on the premises." These must be paid by landlord or tenant. Again, can there be any doubt as to who is to pay them? The landlord's obligations cannot, like the tenant's, be expressed in the terms of the agreement, for the simple reason that they are implied, not express terms; but is there the least possible doubt as to what they are, and that they can substantially be stated in the terms of the agreement in this covenant, viz.: C, the landlord shall pay and keep the tenant indemnified in respect of "all rates and taxes at present existing or assessed on said premises, except the five-sevenths of the future taxation hereinbefore covenanted to be paid by the tenant"?

I venture to say that it cannot be denied that these covenants A, B, C, accurately carry out the contract, and, further, that it is impossible to frame covenants that do so, which follow more closely the very words of the agreement. No doubt, the substance of the agreement might be also carried out by clauses in the lease providing that the tenant should be entitled to deduct rates and taxes from the rent, and making the covenant to pay only the balance after the deduction. But this would be an entire departure from the form and language of the agreement. It would give a right of deduction not given by the agreement. It would be altering the language and form, and be an attempt "so to model the lease" as to give it a form of illegality which does not exist in the contract, doing the very thing in order to bring about illegality which it is contended would be a wrong thing for the Court to do in order to avoid illegality.

In my opinion, the Court would direct specific performance by a lease, with these covenants A, B, C, following as closely as possible the language of the agreement. It does not require the application of the doctrine of altering the form of the agreement, as in the case of *Carolan* v. *Brabazon* (1). There can be no doubt that if the substance of an agreement can be carried out by two forms of deed, the Court will prefer the legal to the illegal form; but here, as I have said, apart even from this, I think the covenants A, B, C would be held the proper covenants in the present case. I therefore think, on the principle stated by Gibson J. in the second clause of paragraph 5 of his judgment, that we may treat the case as if we were dealing with these covenants.

In my opinion (*a*), the covenants A, B, C express the true construction of the agreement; (*b*) but even if they only express a possible mode of carrying out the agreement by a lease, the Court would adopt it on the principle stated in Fry and in *Carolan* v. *Brabazon* (1).

In either case, therefore, we may take these covenants as expressing the contract in the case either as the true construction of the contract itself or as the terms of a lease made under the decree of the Court in an action for specific performance. Is there anything in the section to make any of these covenants unlawful? Neither is a contract in respect of deduction. They do not give any right of deduction. On the contrary, A expressly says there shall be no such right.

In former times Judges sometimes took a wide view of construction in order to carry out what is called the policy of an Act of Parliament, but freedom of contract is a great principle of the Common Law. I adopt the judgment of Field J. in *Lamb* v. *Brewster* (2), as stating the principle applicable to such cases as the

(1) 3 Jones and La Touche, 200. (2) 4 Q. B. D., at pp. 223, 224.

present decree:—"In order to see whether there is any illegality in the agreement, I must look to the provisions actually made by the statute. I cannot speculate as to possible intentions of the statute not expressed by the words. . . . At the time when that case [*Denby* v. *Moore*] (1) was decided much looser ideas prevailed as to supposed frauds on statutes than at the present time. Now such notions are brought much more closely to the test of the positive language used in the statutes. Before we can make out that a contract is illegal under a statute, we must make out distinctly that the statute has provided that it shall be so."

The only contract prohibited by the section is "a contract to the contrary respecting such deduction." Deduction is a well-known legal expression, and the right to deduct has certain well-known legal incidents quite distinct from those given to a tenant by a covenant by a landlord to pay the rates and to keep the tenant indemnified in respect thereof. In this latter case, the tenant's only remedy if compelled to pay the rates is a personal claim against the landlord for damages for breach of covenant. In the most important proceeding of all—an ejectment for non-payment of rent—prior to the Judicature Act even a set-off was not allowed, and since that Act counterclaims are only allowed under special circumstances (Cherry, p. 107). Of course, if there was a right to deduct, only the balance was due and payable. In *Stubbs* v. *Parsons* (2), Holroyd J. says, speaking of the right to deduct: "The occupier has, as it seems to me, a lien on the next rent given him by the Legislature for the land tax paid by him; but if he parts with the rent without making the deduction, he loses his lien, and has only his remedy by action or set-off." That is, not having exercised his right to deduct, he loses the lien, and has only a much inferior remedy. A cross-claim against an insolvent landlord is not of much value.

It seems to me clear that in point of law and in substance a right to indemnity and a right of deduction are wholly different things. The Poor Law Act of 1838, sect. 77, and the Poor Law Act of 1843, sect. 3, deal specifically with deduction, and the latter distinguishes the right to deduct from the right to sue for money

(1) 1 B & Ald. 125.

(2) 3 B. & Ald. 516.

paid and the right to indemnity. These Acts are in pari materia with sect. 52 (2) of the Local Government Act.

The judgment of Buckley L.J. in the case I shall next refer to shows how strictly statutes restricting freedom of contract are construed. The appellants relied almost entirely on the case, *Tuff* v. *Guild of Drapers* (1). That case depended on sect. 1, sub-s. 1, of the Tithe Act, 1891, which is as follows [His Lordship read the sub-section, and continued]—The occupier agreed to pay to the owner all sums which the owner should pay for tithes. Surely this was in terms what the statute prohibited. But even in this case Buckley L.J. dissented, on the ground that "payment of the tithe rentcharge" in the Act must be taken to mean "payment to the tithe-owner," and that the contract between the parties was in substance a contract of indemnity. The contract was in terms to do what the Act prohibited. Here deduction is the only matter dealt with by the Act. It does not prohibit a contract for either payment by the landlord or a contract for indemnity. Neither the lease nor the contract itself gives a right of deduction to the tenant. Indeed the common form in the lease expressly provides that he shall not have the right to deduct.

As to the estoppel, I agree with the judgments of my colleagues. Madden J. says at p. 504 of the report:—"In the present case it" (the estoppel) "is as to a matter of law, the validity of a contract which, on the hypothesis on which this branch of the case proceeds, has been declared void by Act of Parliament." Now this is to my mind an approach to the supposed doctrine that there cannot be an estoppel against an Act of Parliament. But Madden J. by "a contract" cannot mean "this contract between this plaintiff and this defendant." This contract has never been declared void. The section declares that certain contracts described in the section shall be void. The issue between the parties is whether this contract is one of the class described in the section. That is a matter of law. But the principle of res judicata is not confined to matters of fact.

I adopt the second clause of paragraph 4 of the judgment of Gibson J., which deals with res judicata, adding to the second sentence, after the word "ground," the words, "in a subsequent proceeding between the same parties," and I agree with the judgments of the Lord Chief Justice and O'Connor L.J. in this Court as to the question of estoppel. I do not know what is meant by an estoppel against an Act of Parliament. If it means that a decision that a certain contract is not void under a certain statute cannot raise an estoppel by judgment, I can only say that I know of no authority for any such proposition, and cannot accept it. This, I think, was the view of the present Lord Chancellor, who tried the case, though he felt he ought to decide the point the other way in consequence of the dictum of Bacon V.-C.

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(1) [1913] 1 K. B. 40.

O'Connor L.J. :—

The question that lies at the root of the relations between the parties to this litigation is whether the contract dated 1st September, 1908, is one which is forbidden by sect. 52 of the Local Government Act.

The material clause of that contract is in the following terms:— "We propose to take a lease for a term of thirty-one years from the first day of January, 1909, of the premises hereinafter mentioned at the yearly rent of £240, including all rates and taxes as at present existing or assessed on said premises." At an early stage of this argument the Lord Chief Justice suggested that this clause might be translated as follows:—"We agree to pay £240 a year, you keeping us safe and indemnified in respect of all rates and taxes." In my opinion, that is a perfectly accurate construction of the document. In other words, the landlord, in consideration of the rent, agrees to indemnify the tenants from the rates and taxes.

A right of indemnity is very different in its nature and legal effect from a right of deduction; a right of deduction imposes a lien of that which is to be deducted on that from which the deduction is made; a right of indemnity does not, but merely gives a right of action, which in the case of mutual claims may be pleaded by way of set-off or counter-claim.

This difference between indemnity and deduction being clear and well known, we are asked to read into a statute which forbids a contract of deduction a prohibition of a contract, not of deduction, but of indemnity. The basis of this contention is the supposed policy of the Act of Parliament. I think we must construe the Act of Parliament as we find it. If the Legislature, in its wisdom, had intended to enact that in no circumstances, and by no machinery of contract or otherwise, could the landlord be obliged to pay the amount (necessarily variable) of the poor rate, it could have said so in language which would have been clear beyond all doubt. It has not said so, and that is, to my mind, conclusive against the appellant's contention on this head.

Even if I were to hold otherwise, I should deem the appellant estopped by the proceedings in the Court of the Master of the Rolls from raising the question of the illegality of the contract in the present proceedings. It was argued on his behalf that he can only be estoppel by a decision of a Court on a question of fact. This is clearly wrong. The construction of a contract can be a matter of estoppel just as much as the question whether the contract was entered into or not. I express no opinion as to whether the plaintiff would have been estopped had he not expressly raised the question of the validity of the contract in the Court of the Master of the Rolls. That the appellant did in that proceeding raise the question, and raise it in the most explicit way, is clear beyond question. He raised it in his affidavit to ground the summons—the only thing in the nature of a pleading we have. He argued it before the Chief Clerk—as appears by the Chief Clerk's memorandum, prepared by the appellant himself. Had it been decided in his favour, he would have taken the benefit of the decision; it was decided against him by the Chief Clerk; he cannot now be heard to say that he did not litigate the very question he now asks us to decide in his favour. The circumstance, which I infer, that the point was not argued when the Chief Clerk's memorandum came before the Judge seems to me to be immaterial. For these reasons, I think the appeal should be dismissed.

Solicitors for the appellant: *Wm. Smyth & Sons.*
Solicitor for the respondent: *James Dickie.*

R. ST. J. C.

GRIMES *v.* CONNELL (1).

K. B. Div.
1919.
Nov. 21.

Practice—Payment into Court with a plea of tender—Acceptance in satisfaction—Failure to give notice thereof to defendant—Order 22, rule 8—Motion to dismiss for want of prosecution.

In an action for a liquidated demand, the defendant as to portion thereof pleaded a defence, and as to the balance pleaded tender before action and payment into Court. The plaintiff drew out the sum so lodged, but did not give the notice of acceptance prescribed by Order 22, rule 8.

Held, that the defendant was entitled to an order dismissing the action for want of prosecution, with costs (measured) of the motion, and to his taxed costs of the action.

Motion to dismiss the action for want of prosecution.

The action was brought by Christopher M. Grimes, solicitor, as executor of John Gore, deceased, to recover from Thomas Connell £28 8*s.*, arrears of rent due out of the premises 22 Woodfield Terrace, Inchicore, held by the defendant from week to week at the weekly rent of 8*s.* 6*d.* The defendant pleaded that the standard weekly rent, as arrived at under the provisions of the Increase of Rent and Mortgage Interest (War Restrictions) Acts, was 8*s.* and not 8*s.* 6*d.* He stated that he had tendered the amount of the arrears on this basis before action brought, and lodged that amount with his defence. On June 13, 1919, the plaintiff served the defendant with a notice that he accepted the sum of £21 10*s.* which had been paid into Court in satisfaction of the claim in respect of which it had been paid in; and drew out the sum so lodged, but did not inform the defendant that he did so in full satisfaction of his claim in this action.

Kavanagh, for the defendant.

O'Connor, for the plaintiff.

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(1) Before Dodd, Gordon, and Moore JJ.

K. B. Div.
1919.

GRIMES
v.
CONNELL.

DODD J. :—

The defendant pleaded tender and lodged the amount in Court. The plaintiff by notice purported to accept the sum lodged, as having been lodged in satisfaction of the action. This was embarrassing. If the action had gone on, and the defendant had succeeded on the plea of tender, he would have been entitled to the full costs of the action. If the money had been lodged, not with a plea of tender, but in full satisfaction of the plaintiff's cause of action, the plaintiff would have been entitled to the costs. The plaintiff was entitled to draw out the money lodged by the defendant with a plea of tender, but would not otherwise have been entitled to do so.

The defendant was accordingly obliged to bring this motion. The plaintiff's counsel now states in open Court that the money was taken out as terminating the action. This motion was therefore rightly brought. The defendant is entitled to three guineas costs of the motion, and to have his costs of the action taxed as against the plaintiff.

GORDON and MOORE JJ. concurred.

Solicitors for the plaintiff: *Gore & Grimes.*
Solicitor for the defendant: *E. J. M'Hugh.*

H. H.

CULLEN *v.* DUBLIN UNITED TRAMWAYS COMPANY (1896), Ltd. (1).

K. B. Div.
1919.
June 16.
Appeal.
1919.
Nov. 12, 13.
Dec. 1.

Negligence—Tramway Company and intending passenger—Accident occasioned by intending passenger jumping from tramcar in motion—Volenti non fit injuria—Duty of company to person wrongfully on car—Regulations—Effect of when not enforced.

The plaintiff, wishing to mount one of the defendants' tramcars, waited at one of the appointed stopping places. When the car approached the stopping place, it slowed down, but, as it was full, it did not stop. Whilst the car was in motion, a passenger already on the car jumped off, and the plaintiff swung himself on to the step of the moving car, seizing a bar with each hand, and placed one foot on the platform with a view to mounting further. The conductor, who had been inside the car collecting fares, thereupon came out on the platform, and closed the gate of the platform against the plaintiff, saying to him that the car was full and he could not get on, to which the plaintiff replied that he was already on the car, and that another passenger had got off. The conductor then said, "It does not matter; you must get off"; and when the plaintiff then asked that the car should be slowed down to enable him to alight, the conductor refused, saying, as the plaintiff alleged, in an aggressive tone, "I will not; you must get off." The plaintiff then jumped from the car, which had then increased its speed, and incurred injuries.

In an action against the company for damages for negligence, the Judge at the trial, at the close of the plaintiff's case, directed a verdict for the defendants. On an application by the plaintiff for a new trial:

Held, by the Court of Appeal (Ronan and O'Connor L.JJ., Sir J. Campbell C. dissenting), that the judgment of the King's Bench Division (Kenny and Moore JJ., Molony C.J. dissenting) refusing a new trial should be reversed, on the grounds that it was not sufficiently clear that the injuries of the plaintiff were incurred solely by his own voluntary act, and that there was some evidence fit to be submitted to a jury of breach of duty on the part of the defendants' servant.

Delany v. *The Dublin United Tramways Co.* (30 L. R. Ir. 725) considered.

Trial of Action.

This action was tried before Pim J. and a common jury on the 29th day of April, 1919. It was brought to recover damages for personal injuries sustained by the plaintiff by reason of the negligence of the defendants' servants on the 29th October, 1918, when the plaintiff was lawfully on a tramcar of the defendants at Merrion Square, in the city of Dublin.

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(1) Before Molony C.J., and Kenny and Moore JJ.

The facts are set out in the learned Judge's report of the trial, the material portions of which are as follows:—

John J. Cullen, the plaintiff:—I am a commercial traveller, and I live at Blackrock. On the 29th October, 1918, at about 5.50, I was at the corner of Merrion Square and Merrion Street, at the place where the outgoing trams stop. There is a notice up there which says: "Wait here for the trams." A tram came from the Pillar and slowed down as it came to the stopping point, but did not stop. A man got off. I jumped upon the footboard when he got down. I was on that part of the footboard which is behind the upright bar. He got off in front of the car; there were people on the platform. I stepped round the bar on to the front footboard. There was, as far as I recollect, a helper on the platform. I was holding the bar, and had put my left foot upon the platform. The conductor came from inside the car and caught hold of the iron gate and put it across. He said, "You cannot get on; the tram is full." I said I was on the tram and a passenger had got off, and why would he not let me on to the platform? He said, "It does not matter; you must get off." The tram continued to go on, and began to move faster. I asked him to slow the tram and I would get off. He said, "I will not, and you must get off," in an aggressive tone. I dropped and struck against the ground; no one came to my assistance. There were very few people in the neighbourhood. I got up and walked to Holles Street; got on the tram there. I took its number, 326. It was the next tram after the one from which I had fallen. An inspector boarded the car. I asked for the number of the previous car, as I had met with an accident. When I got home I saw a doctor.

Cross-examined—I had a good grip by both hands when I got round the upright bar; one hand was on the bar and the other on the ordinary horizontal bar. I would have been quite safe had I not been meddled with. I was ordered off and went. I was not shoved off. I was not allowed by the conductor to remain on the tram. He said, "I will not allow you to stay on the tram." I dropped off.

Thomas J. Foley—I had not known Cullen before the accident. I was on the car, standing on the back platform. As we approached Merrion Square we slowed down; we were going slowly. I heard the plaintiff saying, "When a passenger has got off, why will you not let me on?" He was on the step. The passenger had just got off before he jumped up. The conductor said, "You cannot get on; it is full." He then pulled the gate across. Cullen said, "If you stop or slow the tram, I will get off." The conductor said, "I will not stop the tram; you will have to get off." I saw Cullen jump off.

Cross-examined—The tram was very crowded. The conductor was not on the platform when the passenger got off, and Mr. Cullen jumped on; he was inside the car.

Dr. Boland examined on behalf of the plaintiff.

Sir Arthur Chance was examined on behalf of the defendants.

Serjeant Sullivan asked me for a direction on the ground that there was no evidence of negligence on the part of the defendant company.

The bye-laws of the Tramway Company were put in, and it was argued by Mr. M'Grath that when the plaintiff was ordered to get off the tram he was bound to do so, as otherwise he would have left himself open to a prosecution for disobeying the bye-laws.

I came to the conclusion, first that there was no invitation by the defendants to any would-be passenger to get on the car while it is in motion; that the plaintiff jumped on to the car at his own risk. That he could have got off when first directed to do so without any risk; that he could well have remained where he was till the car stopped at the other corner of Merrion Square; that he was not bound to get off in the middle of the journey, and that, if he got off, he did so at his own risk; that there was no negligence on the part of the Tramway Company; and I accordingly directed the jury to find for the defendants.

The plaintiff based his application for a new trial on the grounds that there was evidence in support of the plaintiff's claim proper to be left to the jury, and that the learned Judge was wrong in withdrawing the case from the jury and directing judgment for the defendants.

M'Grath K.C. and *Moonan*, for the plaintiff.

Mr. Serjeant Sullivan K.C., *Lynch K.C.*, and *Collins*, for the defendants.

The arguments were similar to those in the Court of Appeal.

Cur. adv. vult.

MOORE J.:—

I was at first disposed to think that the plaintiff was entitled to have a finding from the jury as to whether or not there was a breach of duty towards him on the part of the defendants by reason of the conductor having in the first place acted improperly, and in the second place having thereby caused the injuries for which the plaintiff claims damages. But on consideration of the facts and of the authorities, I have come to the conclusion that the learned Judge was right in directing the jury as he did.

The negligence complained of must be established as a breach of duty, and it is important to see in what relation the defendants and the plaintiff stood to each other, for by that the duty must be measured.

The plaintiff's evidence shows that he thrust himself, in breach of the bye-laws, on to the step of the defendants' car while in motion. There was no invitation of any sort to him to enter the car at all. His intrusion was in breach of the law, and was made entirely at his own risk. Very shortly afterwards, and while he was still on the step, the conductor observed him, and at once told him, for reasons which seemed to him sufficient, that he would not accept him as a passenger, and drew the iron gate across between the step and the platform, with the plaintiff outside it on the step, thus cutting him off from entering the car, or even standing on the platform.

Cullen's original intrusion was itself a trespass, but one which could have been waived had the conductor accepted him as a passenger. However, once the conductor refused to do so, he remained a trespasser while on the car during the rest of the transaction; in other words, he was not lawfully there. If he had been a passenger, the duty of the defendants to him would have been on the highest plane; if a licensee, it would have been at least secondary; but it was lowest towards him as a mere trespasser. See judgment of Buckley L.J. in *Norman* v. *Great Western Railway* (1).

The duty to a trespasser is stated by Hamilton L.J. in *Latham* v. *R. Johnson* (2), quoting from *Grand Trunk Railway* v. *Barnett* (3):—"The owner is under a duty not to injure the trespasser wilfully: 'not to do a wilful act in reckless disregard of ordinary humanity to him,' but otherwise a man 'trespasses at his own risk.'"

Reading the dissentient judgment of Barry L.J. in *Delany* v. *Dublin United Tramways Co.* (4), to which I refer because it was relied on in the argument before us on behalf of the plaintiff, it is plain that the conductor was entitled to use force, reasonable and proper, if necessary for removing Cullen from the car, and the Lord Justice only considered that it might be a question for the jury whether in that case the conductor used force disproportionate to the mischief or the gravity of the trespass, and therefore unreasonable. The other two members of the Court held that the conductor was justified in pushing the trespasser off the car.

In the present action the conductor's rights included the right, if necessary, to use force, reasonable and proper, provided that, in the words of Hamilton L.J., he did so without a reckless disregard of ordinary humanity towards Cullen. The conductor's acts in the circumstances are plainly within this provision, for at no period did he use any force at all. He did say, "You must get off." I will assume that, as Cullen swears, he said it aggressively. Cullen then asked him to slow down, and he again said he would not slow down, and that he (Cullen) must get off. The conductor refused to slow down. In my opinion he was not bound to do so. He would not have been obliged to do so even for a passenger lawfully on the car, except at a .recognized stopping place. Cullen was still a trespasser. It is the same thing as if the stowaway instanced by Barry L.J. had asked the master to divert the ship's voyage to put him ashore at a convenient port to the stowaway. If the defendants, by the conductor, had used force, as he was, within limits, entitled to do, and had pushed the plaintiff off, I could understand that there might be a question for the jury based on some alleged differentiation between the facts of this case and those of Delany's, and such question would be whether or not he had acted negligently towards the plaintiff, meaning "in reckless disregard of ordinary humanity." But in this action there was not only no force used, but there is not a tittle of evidence which could support a finding on such an issue. I look on the conversation as merely equivalent to the conductor telling Cullen he must not stay where he was; that Cullen said, "Very well, I will get off when you slow down; do it now." The conductor said, "I won't slow down now, but you will have to get off as soon as you can do so." I cannot hold that the conductor used physical or moral force sufficient, for instance, to induce the man to imperil himself unreasonably in this. The conductor was within his legal right in all he said or did, and the defendants accordingly were not guilty of any breach of duty towards the plaintiff. I therefore think that the conductor did not act improperly.

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(1) [1915] 1 K. B., at p. 591.

(2) [1913] 1 K. B., at p. 411.

(3) [1911] A. C. 361.

(4) 30 L. R. Ir. 751.

But I also decide this case on a further ground, quite distinct in theory, though somewhat closely in appearance connected in fact with the preceding, in considering the actual cause of the injuries.

Assuming, which I do not assume, that the defendants were guilty of a breach of duty in the premises, which I do not hold, was such breach of duty the cause of plaintiff's injuries? I am of opinion that it was not. The plaintiff, trespasser as he was, was in a place of comparative safety, though at his own risk. At his own election, instead of waiting till the car slowed down (and he had been expressly warned that it would not slow down for his special convenience), he proceeded to put himself in a position of danger by attempting to leave it, as he had entered it, while in motion. I am of opinion that there was no necessity whatever for him to do so.

It is exactly the same case as is described by Andrews J. in the concluding portion of his judgment in *Martin* v. *Dublin United Tramways Co.* (1). "I think," said the learned Judge, "even if there was negligence on the part of the defendants' servants, it could not be regarded as a natural and reasonable consequence of such negligence that the plaintiff would place himself in the position of danger to which he voluntarily and without invitation exposed himself to avoid the temporary inconvenience of being carried some distance beyond where he wished to alight." In other words, if Cullen took an unnecessary risk, the defendants are not to blame. I think that it is plain he did so, and that any injuries he sustained were entirely the result of his own action, and that the learned Judge was right in his direction.

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(1) [1909] 2 I. R., at p. 22.

KENNY J.:—

The facts of this case lie within an extremely narrow compass. The plaintiff endeavoured to enter a tramcar at a moment when the latter was in motion and full. He was opposed by the conductor, who informed him that the car was full and that he could not get on, and who, to enforce his warning, drew the iron gate across in order to hinder any further movement on the part of the plaintiff. The plaintiff was on the footboard or step, and commenced to argue with the conductor, and contended that the conductor should allow him on to the platform. The conductor absolutely refused to do so, and the plaintiff's case is that at this period the car began to move faster, and that the plaintiff, stating that he would get off, asked the conductor to slow the tram. He swears that the conductor said he would not slow the tram, and—in an aggressive tone—that the plaintiff must get off. The plaintiff thereupon "dropped" off, and injured himself in the act of doing so. On cross-examination he added that he was ordered off, and went, and was not shoved off. The trial Judge was of opinion that the plaintiff jumped on to the car at his own risk; that he could well have remained where he was till the car stopped at the next stopping place; and that there was no evidence of any negligence on the part of the defendant company.

The bye-laws of the tramway company were in evidence. They prohibit passengers from travelling on the steps of a car and from entering or attempting to enter or leave a car while in motion, and they declare that a passenger travelling on the steps must cease to do so on being requested by the conductor to leave. Penalties are provided for breaches of the bye-laws.

On these facts, I fail to see how this case can be regarded as a weaker one than that of *Delany* v. *Dublin United Tramways Co.* (1), which went to the Court of Appeal. In that case, as in this, the question was whether there was any reasonable evidence of negligence on which a jury could find a verdict in favour of the plaintiff. If there was any such reasonable evidence, of course the verdict directed by Pim J. cannot stand, and there should be a new trial. But we should be satisfied before directing a new trial that the facts disclose such reasonable evidence. It is quite settled that the question for the Judge at the trial and for the Court in banc on an application for a new trial is not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established: *Jewell* v. *Parr* (2); *Hanbury* v. *Bank of Montreal* (3). In other words, whether there is something beyond the mere scintilla referred to in the speech of Lord Atkinson in the latter case, the doctrine in respect of which he shows has been abandoned.

In my opinion there is not even a scintilla of reasonable evidence of negligence in the present case. Compare it with *Delany's Case* (1), in which a drunken man who was trying to board a tramcar while it was in motion was pushed off by the conductor, and fell, sustaining serious injuries. The Exchequer Division held that there was evidence of negligence to go to the jury and that it was competent to the jury to find that to push the man off while the car was in motion was an unreasonable and dangerous way of removing him and a breach of the duty to use due care, and a verdict for the plaintiff was accordingly upheld. The case went to the Court of Appeal, and the decision of the Exchequer was reversed, on the ground that the plaintiff was acting illegally in forcing his way into the car,—that by doing so he placed himself in a position of peril and the conductor in a position of difficulty,—and that there was no such want of care and skill on the part of the conductor as to amount to evidence that it was the latter's negligence that caused the accident. The points of difference between that case and the present all tend, in

(1) 30 L. R. Ir. 725.

(2) 13 C. B. 909, 916.

(3) [1918] App. Cas. 626.

my opinion, in the direction of showing that the present is an a fortiori one. If the conductor had pushed the plaintiff off instead of merely saying, even in an aggressive tone, "You must get off," identity with *Delany's Case* (1) would be established. In the Court of Appeal both Lord Ashbourne and FitzGibbon L.J. in the course of their judgments discuss the legal right of the plaintiff and the duty of the conductor. The plaintiff was never lawfully on the tramcar, and his legal right was only the negative one possessed by every trespasser, namely, that he should not be treated recklessly or with undue violence. The conductor owed the plaintiff—a trespasser—no duty but that of trying to get rid of him without unnecessary violence. I take these statements from the judgments of the majority of the Court. Barry L.J. differed only on the question whether the conductor had used unnecessary and excessive force in expelling the plaintiff. In the case before us there was no physical force used; and what is relied on is the moral force supposed to be exercised by the conductor's aggressive tone and mandatory expression. The conductor's command, "You must get off," seems to me susceptible of the meaning that the plaintiff must leave the car at the next stopping place; but even if it was understood by the plaintiff as meaning that he should get off at that moment and while the car was in motion, I cannot attribute the happening of the accident to any act on the part of the conductor. If he had pushed him off, *Delany's Case* (1) is an authority for holding that so long as no unnecessary violence is resorted to there is no case for the jury. Lord Bramwell's observations in *Membery* v. *Great Western Railway* (2) on the subject of moral compulsion as contrasted with physical constraint in relation to the doctrine of volenti non fit injuria are very apposite.

In the present case the conductor was guilty of no violence; the plaintiff dropped off the step of his own accord; he, unfortunately, did so in an awkward way, and was the exclusive author of the injuries that he received.

In my judgment the verdict and judgment for the defendants should not be disturbed.

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(1) 30 L. R. Ir. 725.

(2) 14 App. Cas. 179.

MOLONY C.J.:—

In this case I have arrived at a conclusion different from that of my colleagues.

This is a motion to set aside the verdict and judgment entered for the defendants by Mr. Justice Pim at the trial of this action, and to direct a new trial.

It appears that the plaintiff, on the 29th October, 1918, was at the corner of Merrion Square and Merrion Street, where the Dalkey trams stop on their outgoing journey, and where there is a notice advising the public to "wait here for car from city."

The plaintiff waited for the tram. One came in a short time and slowed down, but did not stop. A passenger got off, and the plaintiff then jumped upon that part of the footboard which is behind the upright bar, and stepped round the bar on to the front footboard. He was holding the bar, and had put his left foot upon the platform, when the conductor came from inside the car, caught hold of the iron gate and put it across, and thereby compelled the plaintiff to take his left foot off the platform. The position of the plaintiff then was that both his feet were on the step, but he had a good grip with both hands, and he says himself he would have been quite safe if he had not been meddled with. The conductor, however, said, "You cannot get on; the tram is full"; and when the plaintiff drew his attention to the fact that a passenger had got off, and asked why should he not get on, the conductor replied, "It doesn't matter; you must get off."

The position of affairs then was that the plaintiff was required to get off; the tram was beginning to move faster; the conductor was asked to slow the tram, but he replied, in an aggressive tone, "I will not, and you must get off." The statement on this point is corroborated by the evidence of an independent witness, Foley, who swore that the words the conductor used were, "I will not stop the tram; you will have to get off." The plaintiff thereupon jumped off the car, and, unfortunately, fell; and the question is whether, in the circumstances, any liability attaches to the Tramway Company.

The bye-laws of the company were put in evidence, and have been relied upon by both parties. Bye-law 17 provides that "no passenger or other person, not being a servant of the company on duty, shall be entitled to travel on the steps, or platform, or stairs of any carriage, ... and shall cease to do so immediately on request by the conductor." Bye-law 19 provides that when any carriage contains the full number of passengers which it is licensed to contain, no additional person shall either mount or remain in or on such carriage when warned by the conductor not to do so; and bye-law 21 provides that no person shall enter, mount, or leave any carriage whilst in motion.

In the present case the plaintiff in getting on the car whilst in motion violated bye-law 21, although we all know that this bye-law is far "more honoured in the breach than the observance"; but the violation of this bye-law, whilst it rendered the plaintiff liable to a penalty of 40*s.*, did not authorize the conductor to require the plaintiff to leave, and did not make the intending passenger a trespasser. The tram being full, however, the conductor was authorized by bye-law 19 to warn him that he should not remain in or on the car, and he would have been perfectly justified in stopping the tram and requiring him to get off. Again, under bye-law 17 the conductor was authorized to prohibit the plaintiff from travelling on the step, and the plaintiff was bound to cease to do so immediately on request by the conductor; but was the conductor authorized to require the plaintiff to get off the tram while the tram was in motion, and to refuse to stop the tram for the purpose of enabling the plaintiff to get off in safety? My opinion is that, while there was a duty upon the plaintiff to get off the steps when he was required to do so by the conductor, there was a correlative duty upon the conductor to stop the tram in order to enable him to do so.

It was argued on behalf of the company that the words used by the conductor did not amount to a requirement to get off the tram at once, but meant that he should get off when the tram next stopped. I do not think that this is a fair construction of the words which were admittedly used; but in any event that is a question upon which the jury would be entitled to express an opinion.

In my opinion, there was evidence upon which the jury could have been asked to determine—

1. Whether the conductor had required the plaintiff to get off the tram while it was in motion?

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Molony C.J.

2. If so, was the conductor guilty of negligence in refusing to stop the tram?

3. If so, was the refusal to stop the tram when asked the proximate cause of the accident?

As regards the conclusions of Mr. Justice Pim, I agree that there was no invitation by the defendants to get on the car while it was in motion, and that the plaintiff jumped on to the car at his own risk; but he got on to the car in perfect safety, and would have remained in perfect safety had the conductor not intervened. As regards the learned Judge's finding, that he could have got off when first directed to do so without any risk, I do not think there is any evidence of this, and even if there was such evidence, it would be a question for the jury. Mr. Justice Pim also came to the conclusion that he could have remained where he was until the car got to the other corner of Merrion Square; but the conductor did not give him the option, and need not have done so under bye-law 17; and there was no reason to assume that the car would have stopped at one corner of Merrion Square more than the other. It is quite true that the plaintiff was not bound to get off in the middle of the journey, but if he was required to get off by the conductor, it is not fair to say he got off at his own risk.

I have come to the conclusion that this case should have been left to the jury, and consequently I think that the judgment of the learned Judge at the trial ought to be set aside and a new trial directed.

H. J. M'C.

Nov. 12, 13. Dec. 1.

The plaintiff appealed to the Court of Appeal (1).

W. M'Grath K.C. and *Moonan*, for the appellant:—

The case should not have been withdrawn from the jury. The plaintiff was not a trespasser. He was lawfully on the step of the tramcar, and was entitled to present himself as a passenger. No doubt the tramcar had not stopped, but it is common knowledge that the bye-law prohibiting the entry on a tramcar in motion is not enforced by the company. Passengers mounting and leaving

(1) In the Court of Appeal, before SIR JAMES CAMPBELL C., and RONAN and O'CONNOR L.JJ.

tramcars in motion are to be seen in the streets of Dublin every day. In *Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery* (1) it was held that notices put up by the railway company forbidding persons to cross the line at a particular point, which notices had been continually disregarded, and not enforced by the company, could not be relied on by them as a defence in the case of an injury occurring to anyone crossing the line at that point. The plaintiff had seen another passenger leaving the tramcar, and was entitled to think that there was then room for him. It was at least a question for the jury whether or not the plaintiff was entitled to arrive at that conclusion. Having lawfully presented himself as an intending passenger, it is impossible to say that the defendants owed him no duty. The defence of "volenti non fit injuria" has no application. When he was twice told by the conductor that he must get off, he was in the position of either being induced or forced to get off by the conductor. Under the bye-laws of the company, when the tramcar contains the full number of passengers which it is licensed to carry, no additional person can remain in or on the car when warned by the conductor not to do so. The plaintiff would have been liable to prosecution and a penalty if he had remained, and the conductor should have stopped, or at least slowed down, to enable the plaintiff to alight. There is no evidence he could have got off safely when first told the tram was full. It is not necessary for us to go the length of contending that the plaintiff acted in anticipation of physical violence if he refused to get off. The inducement to get off is sufficient. He did not get off voluntarily. He was forced off recklessly by the plaintiff. *Delany* v. *Dublin United Tramways Co.* (2) is clearly distinguishable. There the drunken man, whose presence would have been a danger to other passengers, was making a continuous effort to mount the tram, which brought about the accident. Here the plaintiff was lawfully on the tram, and was anxious to alight, if allowed to do so. His request for the tram to be slowed was eminently reasonable. There was misconduct on the part of the plaintiff in *Delany's Case* (2); there was none here. An appeal in that case, even taken to the House of Lords, and the case was subsequently compromised. The principle of the decision, if correct, should certainly not be extended. See note in Beven (3rd ed., vol. I, 146). In *Yarmouth* v. *France* (1) the plaintiff had objected to drive a dangerous horse, but was directed by the defendant's foreman to continue doing so, and was subsequently injured by a kick from the horse. It was there held that the circumstances did not conclusively show that the risk was voluntarily incurred by the plaintiff: *Smith* v. *Baker and Sons* (2). It was for the jury to say whether or not the plaintiff was injured by his own voluntary act, or whether he was induced or forced by the action of the conductor to alight.

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(1) 3 A.C. 1155.

(2) 30 L. R. Ir. 725.

Serjeant Sullivan K.C. and *P. Lynch K.C.* (*Collins* with them), for the respondents:—

The plaintiff was a trespasser and nothing more, to whom the defendants owed no duty beyond acting in a reasonable manner. In *Norman* v. *Great Western Railway* (3) Buckley L.J. states:— "The liability of a person on whose land another comes towards the latter, in respect of not exposing him to danger, may be stated in an ascending scale. The liability is lowest towards a trespasser . . . He had no right to be there, and if he is injured he must bear the consequences." He was as much a trespasser as was the injured man in *Grand Trunk Railway Co. of Canada* v. *Barnett* (4). The plaintiff's legal position was not that of a man presenting himself as an intending passenger. He could only have done that when the car stopped. There was no invitation to him to mount the tramcar; on the contrary, when it did not stop at the regular stopping place it was the clearest intimation that the car was full. Being wrongfully on the car, his injuries were subsequently incurred by his own voluntary act in jumping off whilst the car was in motion. He cannot recover damages unless he can establish that that was a reasonable act on his part, having regard to the alternative course open to him—namely, to remain where he was until the car stopped or slowed down at the next stopping place. He was not "placed by the misconduct of the

(1) 19 Q. B. D. 647.
(2) [1891] A. C. 325.
(3) [1915] 1 K. B. 584, at p. 591.
(4) [1911] A. C. 361.

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defendants in such a situation as obliged him to adopt the alternative of a dangerous leap": *Jones* v. *Boyce* (1). He was in a position of at least comparative safety where he was, holding a bar with each hand, and standing on the step. He was only dislodged from that position by his own voluntary act in jumping off. He knew his own physical powers, which the conductor did not, and he was from first to last the author of his own wrong. The language used by the conductor cannot reasonably be construed to mean that the plaintiff was to jump off then and there. It only meant that he could not be accepted as a passenger, as the car was full. The conductor could have taken no other course. The negligence, if any, of the conductor in not slowing down did not entitle the plaintiff to jump off: *Martin* v. *The Dublin United Tramways Co.* (2). At the most he was guilty of an error of judgment in circumstances of difficulty in which he was placed by the plaintiff himself: *Delany* v. *Dublin United Tramways Co.* (3). There was no compulsion by the conductor. Mere language can never amount to physical compulsion or assault. The plaintiff himself did not state that he was afraid he would be thrown off if he did not jump from the tram. There is no suggestion of such a case in the pleadings or in the particulars of negligence, nor was the point taken at the trial. There is no evidence to support it, and it is not now open to plaintiff. There was at least contributory negligence on the plaintiff's part. The case was rightly withdrawn from the jury. In *Coyle* v. *Great Northern Railway Co.* (4) Palles C.B. said:—"To justify a Judge in leaving the case to the jury, notwithstanding the voluntary act of the injured person, which contributed to the injury complained of, the circumstances must be such as either, firstly, to make the question whether that act is negligent (either per se, or having regard to the conduct of the defendants in inducing or affecting it) a question of fact; or, secondly, the circumstances must be such as to render reasonable an inference of fact that the defendants, by using due care, could have avoided the consequences of the plaintiff's negligence. If the case be so clear that the determination of these two questions

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(1) 1 Starkie, N. P. 493.
(2) [1909] 2 I. R. 13.
(3) 30 L. R. Ir. 725.
(4) 20 L. R. Ir. 409.

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involves no inference of fact, it is for the Judge and not for the jury."

M'Grath K.C., in reply, relied on *Osborne* v. *London and North-Western Railway Co.* (1), and *Hutchins* v. *London County Council* (2).

[The following cases were also referred to:—*Thrussel* v. *Handyside* (3); *Curtin* v. *Great Southern and Western Railway Co.* (4)].

SIR JAMES CAMPBELL C.:—

As my conclusions in this case are at variance with those at which my colleagues have been able to arrive, they cannot affect the result; but in view of the far-reaching importance of the case for the defendants, and all owners of vehicles, I think they are entitled to the reasons for my decision.

The plaintiff is a resident in Blackrock, and on the 29th October, 1918, was waiting at about 5.50 p.m. at the Merrion Street corner of Merrion Square, North, for the purpose of entering a tramcar from Dublin to Blackrock. At this corner there is the usual standard, a pillar with the notice affixed, "wait here for the trams," the method adopted by the tramway system in Dublin for indicating the places at which the cars will stop to allow passengers to leave the car or intending passengers to enter, unless the car is full. A car was approaching this corner from the city, and as at this particular place two streets cross at right angles, and there is considerable traffic, it slowed down, but did not stop. This fact in itself, coupled with the pressure of passengers on the platform, was not only a plain indication that it was full, but also that the company's servants in charge of the car were not prepared to admit any more. As it reached the corner a man got off the car while it was still in motion, and at this moment the plaintiff jumped on to the lower step, which is below the rear platform, and grasped an upright bar, which rises from about the centre of the extreme edge of the platform, and passed along the lower step until he reached the end of it nearest the body of the car. There was a man on the platform who was apparently a helper to the conductor, and as plaintiff proceeded to put one foot upon the platform the conductor, who was inside collecting fares, came out to the platform, having, as I would infer, received notice of the situation from the helper, and pulled across and closed the gate which shuts off this lower step from the platform, telling the plaintiff at the same moment that he could not get in, the tram was full. These incidents, which occupied but a few seconds, negative, in my opinion, the suggestion which has been made, that the plaintiff in jumping on to the lower step of the car did so with the acquiescence of the helper, who was powerless to anticipate or prevent this act by the plaintiff, and who plainly and, as I think, most properly left the situation to be dealt with by the conductor as the official in charge of the car. The car at this stage had not increased its speed, but the plaintiff, instead of leaving the car, started to argue the point, retorting that he was already on, and adding that as a passenger had got off, why should he be not let on. The conductor replied that it did not matter; he must get off. At this moment the car began to travel at a faster rate, and the plaintiff thereupon asked the conductor to slow the tram, and he would get off; but the conductor replied, it is said, in an aggressive tone, "I will not, and you must get off." The plaintiff thereupon, to use his own words, dropped off the car, and losing his balance fell on the street, but got up and proceeded as far as Holles Street corner, where the next outgoing car stopped, into which he got and travelled to his home. Upon cross-examination he stated that before he dropped off he was grasping the upright bar with one hand and a horizontal bar with the other, and would have been quite safe had he not been meddled with. A passenger named Foley, who was one of the persons standing on the platform, substantially corroborates the plaintiff's story, save that he says nothing as to anything aggressive on the part of the conductor, and states that the plaintiff said, "If you stop or slow the tram I will get off." He states that the tram was very crowded, and that he saw the plaintiff "jump" off the car. A medical witness was then called on each side, but their evidence is not set out in the Judge's report, as it is not material on this appeal, having regard to the result of the trial. The case having thus closed on both sides, Serjeant Sullivan, on behalf of the defendants, applied for a direction on the ground that there was no evidence of negligence, while Mr. M'Grath relied on the bye-laws of the company, as approved by the Board of Trade, as proof that the plaintiff when ordered to get off was bound to do so, as otherwise he would have left himself open to a prosecution for disobeying the bye-laws; but neither at this nor any other stage in the trial did he ask or suggest that any question should be left to the jury as to whether the plaintiff had jumped from the car in terror lest he would be ejected by force by the conductor.

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(1) 21 Q. B. D. 220.
(2) 85 L. J. K. B. 1177.
(3) 20 Q. B. D. 359.
(4) 22 L. R. Ir. 219.

Pim J. being of opinion that there was no invitation by the defendants to any would-be passenger to get on the car while in motion, that the plaintiff jumped on the car at his own risk, that he could have got off when first directed to do so without any risk, that he could well have remained where he was till the car stopped at the other corner of the same side of Merrion Square, that he was not bound to get off in the middle of that journey, and that if he got off he did so at his own risk, and that there was no negligence on the part of the defendants, directed a verdict for them; and his direction was upheld by a majority in the King's Bench Division, Molony C.J. dissenting. Upon appeal from this decision the case on behalf of the plaintiff was presented in two ways. First, it is said that he was lawfully on the lower step of the car in his status as what has been called a candidate passenger, and was entitled to assume that as a passenger had got out there was room for him. I cannot yield to this contention. The tram was visibly, as plaintiff's witness described it, very crowded, some passengers being compelled for want of room on the top or the inside to stand on the platform; and the fact that it did not stop at the customary place was direct notice to the plaintiff that it was full, and that no space was available for any more passengers; nor do I think that the incident of a person jumping off the car at that moment assists the plaintiff, as it is quite consistent with the evidence that this person may have jumped on immediately before, and finding it full jumped off again. It has been suggested that we ought to take judicial notice of an alleged custom on the defendants' system to allow numbers of the public to overcrowd the cars at certain periods of the day, or in inclement weather; but in my opinion we are not at liberty to take any notice of the existence of any such practice in the complete absence of any evidence on the subject, more especially as it is expressly forbidden by the regulations. Serjeant Sullivan has said that the defendant company have been prosecuted by the police on different occasions for the breach of this regulation by the conductors; and that it is not only unauthorized, but expressly forbidden by his clients. No evidence to this effect was given, but the necessity for giving it never arose, as there was no evidence to the contrary; and I fail to see how the Court is at liberty to supply it from its own observation, more especially in the face of a regulation posted up in all the cars which expressly forbids the precise matter.

In a very recent case in this Court the experience of its members differed widely inter se as to the extent of an alleged usage on the part of passengers to ring the conductor's bell to stop or start the cars, and as to the knowledge, express or implied, of this usage to be attributed to the tramway company; and the particular case was ultimately decided without reference to either allegation, there being no evidence upon them. Even if the overcrowding of the cars is occasionally connived at by the defendants and their servants, it is plain that there must be a limit to this process, and the circumstances were, in my opinion, a clear intimation to the plaintiff that the limit had been reached in this particular case. Further, I am of opinion that even in the case of an ordinary passenger lawfully upon the car, if, as the result of the neglect of the conductor to stop the car at his request at a particular place, he deliberately jumps off while the car is in motion, and is injured, he is the author of his own injury. The case of *Martin* v. *Dublin United Tramways Co.* (1) expressly so decides, following a previous decision of this Court to the same effect in *Roscoe* v. *Dublin United Tramways Co.* (2). In my opinion, the plaintiff was not lawfully on the car at any time, or at least from the moment when he was refused admission, but was a mere trespasser, to whom neither the defendants nor their servants owed any duty; and as the plaintiff improperly mounted the car while in motion, and as the car at the time was full, and, as I would infer from the evidence, full to his knowledge, his act in getting on the car, as well as in getting off it, was at his own risk, and that he is himself solely to blame for the accident. Indeed, it is, I think, clear from the evidence that had he got off the car when the gate was closed against him and he was told that he would not be admitted as the car was full, instead of contesting the point with the conductor, he could have jumped off as easily as he jumped on, because his evidence is that it was at a later stage that the car commenced to increase its pace. Counsel for the plaintiff, however, have argued the further proposition that, even on the assumption that he was a trespasser, still, in view of the repeated assertion by the conductor that he must get off the car, given, as it is alleged, in an aggressive manner, the plaintiff was justified in regarding this direction as an invitation to alight, or that it entitled him, as a reasonable alternative to being ejected from the car by physical force and violence, to take his risk in jumping off as he did. I am quite satisfied that this case is the merest afterthought of an ingenious advocate who is conscious that his real case has given way beneath him. When the statement of claim and the particulars of the alleged negligence are examined it will be apparent that the sole and only cause of action was alleged negligence to a passenger lawfully on the car. No evidence of any kind pointing to any other conclusion was even given at the trial, unless it is to be found in the mere assertion by the plaintiff that the order to get off the car was given in an aggressive tone—an allegation that is in no way corroborated by his witness. It is clear, from the reasons given by the Judge for his ruling, that no such question was raised at the trial; and counsel for the plaintiff, when the direct question was put to him in this Court, and repeated so as to leave no room for ambiguity or doubt on the matter, admitted in the frankest way that it was not raised or intended to be raised at the trial, and that the case presented was that the plaintiff, being lawfully on the car, was justified in jumping off in order to avoid a prosecution for breach of the regulations.

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(1) [1909] 2 I. R. 13.

(2) [1909] 2 I. R., p. 15, note.

In my opinion, it was the duty of counsel for the plaintiff, when at the close of his case the Judge intimated his intention to direct against him on the only issue raised by the pleadings, to have asked for liberty to raise this alternative case, and his failure to do so disentitles him, in the circumstances of this case, to a new trial for the purpose. I wish to make it very clear that in these observations I am confining myself strictly to the alternative case suggested in argument, that the plaintiff, on the assumption that he was a trespasser, was entitled to jump off the car as an alternative to being forcibly ejected from it, as this is the proposition of which no trace is to be found either in the pleadings, the particulars, the evidence, or requisitions of counsel, or the rulings of the Judge. This was a well-established principle even before the Judicature Acts. See statement of Halsbury C. in *Neville* v. *Fine Art Insurance Co.* (1):—" When you are complaining on non-direction of the Judge or that he did not leave a question to the jury, if you had an opportunity of asking him to do it, and you abstained from asking for it, no Court would ever have granted you a new trial." In *Martin* v. *Great Northern Railway Co.* (2), in which counsel for the defendant omitted to put before the jury a question of fact which was open on the pleadings, and which would, if answered in his favour, have amounted to a verdict for his client, and the Judge had not dealt with it in his charge, the Court refused to grant a new trial for misdirection. The same principle had been repeatedly affirmed by the Courts in this country: see *Latouche* v. *Pennick* (3), where it was held that a defendant, who in an action of ejectment did not rely at the trial upon the Statute of Limitations, could not set it up on a motion for a new trial; and *Whelan* v. *Cork Steam Packet Co.* (4), which decided that where counsel for the defendant applied for a non-suit at the close of the plaintiff's case, but failed to renew his application at the close of his own case, he was not entitled to rely upon misdirection, even though the Judge should have acceded to the requisition at the time it was made. This matter was expressly dealt with by the orders made under the Judicature Acts in these words:—" A new trial shall not be granted on the ground of misdirection unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial of the action"; but subsequently this order was amended both in England and Ireland by the addition of these important words, "or because the verdict of the jury was not taken upon a question which the Judge at the trial was not asked to leave to them."

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(1) [1897] A. C., at p. 76.

(2) 16 C. B. 179.

(3) 10 Ir. Jurist N. S. 321.

(4) I. R. 8 C. L. 333.

In *Russell* v. *Moore* (1) Palles C.B. says, at page 346: "I am unwilling to enter into subtle distinctions to fritter away what I believe to be a broad and wholesome rule—that cases shall be decided by Courts in banc and the Court of Appeal upon the questions raised at the trial, and none other." In *Smith* v. *Baker* (2) Halsbury C. says: "This precaution has been constantly enforced where applications for a new trial have been made in the Superior Courts. It is obvious that it would be unjust to one of the parties if the other could lie by, and afterwards, having failed in the contention that he in fact set up be permitted to rely on some other point not suggested at the trial, but which if it had been suggested might have been answered by evidence." In *Tealon* v. *Burnand* (3) the Court of Appeal directed a new trial on the ground that certain questions which the Judge had not been asked at the trial to submit to the jury should have been left to them, but this decision was reversed by a unanimous judgment in the House of Lords. The questions which were in fact submitted by the Judge had been shown by him to counsel, and no objection made or addition asked, and Halsbury C. says: "Under such circumstances it would really be putting a premium upon the loosest possible mode of conducting business to suggest that questions could be again formulated by counsel, and then submitted to another jury." Lord Morris, in his judgment, expresses the same view in these emphatic words: "My Lords, of course I do not say the rule is so extreme that if there were some extraordinary miscarriage of justice the persons concerned should be bound by it, but in any ordinary case, in my opinion, the parties must be bound by what is called the course of the trial."

The order in question—Order 39, rule 7—says that a new trial shall not be granted, save and except the Court is of opinion that some substantial wrong or miscarriage has been thereby

(1) 8 L. R. Ir. 318.

(2) [1891] A. C., at p. 333.

(3) [1900] A. C. 135.

occasioned—an exception which, in my opinion, has no application where the question omitted to be raised is not open on the pleadings, and where counsel for the party concerned has deliberately abstained from raising it, and least of all where neither surprise nor discovery of fresh evidence can be suggested.

I have, I fear, unduly elaborated this aspect of the case, but have done so advisedly, as I have noticed an increasing laxity on the part of counsel to insist on their clients' strict rights at the trial, or in making the appropriate requisitions, or formulating the suitable questions, trusting too much to their chances on new trial motions, which are becoming so frequent.

Finally, I am of opinion that, even had this question been open on the pleadings, and even if the plaintiff had been lawfully on the car, the statement by the conductor that he must get off the car was not the cause of his jumping off, and that, even if it was, it could not reasonably be held to be an invitation to alight, or in any sense an actual or implied threat of physical violence, so as to deprive the plaintiff's act of its supremely reckless character—an act within the principle of "volenti non fit injuria." As sworn by himself, he was in a position of safety on the car, and had only to remain where he was until the next occasion upon which the car stopped, which probably or at least possibly might have been a few hundred yards further down the same street, at the corner of Holles Street, where there is a stopping place, and where the next following car stopped, and was boarded by the plaintiff. He did not ask the conductor to let him stay on until then, nor intimate any intention to stay, nor did he allege at the trial that he jumped off from any apprehension that the conductor would eject him by force, and any such allegation would have been contrary to the excuse put forward by counsel on his behalf, to the effect that he jumped off to avoid a prosecution under the company's regulations, while the whole foundation upon which this theory of terror is based is the statement that the tone of the conductor was aggressive, there being no evidence that the conductor laid hands upon him, or even approached him in a menacing attitude.

To apply to such facts the principle which absolves a man from an act prima facie reckless and dangerous, where it is the result of reasonable terror consequent upon a position of imminent and obvious peril, in which he has been placed by the negligence or violence, actual or threatened, of the other party, would, in my judgment, be far-fetched and fantastic. We frequently see in our streets children, even of tender years, hanging on to the steps or the backs of tramcars, motor-buses, and other vehicles, and when they see the conductor hurrying towards them from the top or inside of the car, or are terrified by the driver's whip, dropping off at imminent risk to life or limb. If they were injured by the fall, or run over by a passing vehicle, it can hardly be contended that the conductor in the one case, or the driver in the other, would be guilty of actionable negligence; nor do I consider that if an adult stranger jumped on the footboard of a private motor-car while in motion, the driver or owner would be under any obligation, in ordering him off, to stop the car to enable him to alight.

RONAN L.J.:—

I am of opinion that the judgment of the majority of the Judges in the King's Bench Division should be reversed, and a new trial directed. I wish to preface my judgment with a few observations on the subject which has been so elaborately discussed by the Lord Chancellor, namely, the questions proper to be submitted to the jury. The questions for the jury are formulated when the case is about to be submitted to the jury; they are not formulated when the Judge has expressed his opinion that, on the evidence, the case ought not to go to the jury. When a defendant's counsel asks for a direction at the close of the plaintiff's case, the Judge may, of course, ask counsel for the plaintiff what questions he suggests ought to be put to the jury, and counsel answers; but no such question was put here. Plaintiff's counsel submitted that there was evidence to go to the jury. The learned Judge's own account of what took place is as follows:—"Serjeant Sullivan asked me for a direction on the ground that there was no evidence of negligence on the part of the defendant company. The bye-laws of the Tramway Company were put in, and it was argued by Mr. M'Grath that when the plaintiff was ordered to get off the tram he was bound to do so, as otherwise he would have left himself open to a prosecution for disobeying the bye-laws." Is it to be inferred from this that on the facts in this case the plaintiff's case was confined to this one point? I am wholly unable to agree with the Lord Chancellor in the view he has taken of this matter, because the time for formulating the questions which should be submitted to the jury had not arrived; counsel for the plaintiff had not been asked to formulate them, and it is impossible to my mind to conclude that he based his entire case on this one point, with what I consider the overwhelming evidence of negligence staring him in the face. Nothing done or omitted to be done by plaintiff's counsel in this case can, in my judgment, deprive the plaintiff of his right to have his case tried if Serjeant Sullivan's request for a direction was one which should not have been complied with.

The real question in this appeal is whether on the whole case the Judge should have withdrawn it from the jury. The fundamental principle on which my entire judgment is based is thus stated by Palles C.B., in his often-quoted judgment in *Flannery* v. *Waterford and Limerick Railway Co.* (1): "In applying the rule it must be borne in mind that, before it can lead to a direction against the plaintiff, the Court must assume that every inference of fact which a jury might legitimately draw in favour of the plaintiff has been drawn, and must assume the existence of the fact so inferred, in addition to the facts proved."

I shall not repeat this principle, but it is one which it is important to bear in mind throughout the case, as is the further consideration that we must deal with this case as if the Judge had allowed the case to proceed, and the defendants had declined to give any evidence. When there are matters specially within the knowledge of the defendants, and the defendants elect to give no evidence in explanation of them, the jury are entitled to take this fact into consideration in arriving at their conclusions on the evidence before them. There is, for instance, the question referred to by the Lord Chancellor, and which is of great importance, namely, whether there was an officer of the company on the platform when the plaintiff got on. The plaintiff's evidence is

(1) I. R. 11 C. L. 30.

that there was "a helper" on the platform. The jury would be entitled, in considering the truth of that statement, to ask: if it be not true, why is the conductor not produced to deny it? And as to every inference of fact which the jury might be asked to draw in this case by the plaintiff, they would be entitled to take into consideration, in the absence of any evidence produced by the defendants, the fact that the defendants had the option of producing evidence, and to infer that they did not produce rebutting evidence because they were unable to do so.

In dealing with such a question as this, i.e., whether there is evidence from which a jury could reasonably find a verdict for the plaintiff, we Judges, so far as the question is one of fact, "although not jurors, must avail ourselves of our knowledge of the ordinary affairs and incidents of life. Without this knowledge we cannot determine, as we are bound to do, whether a particular inference can reasonably be drawn. Now, applying my own experience of railway travelling, I find it impossible to say that," etc.: per Palles C.B., in his well-known judgment in *Flannery* v. *Waterford and Limerick Railway Co.* (1). The actual evidence before us consists of 1, a map produced by plaintiff and accepted by the defendants, and 2, the short statement of the facts in the report of the Judge. The medical evidence is not stated; but, as £1000 damages are claimed, I assume the plaintiff sustained very serious injuries. In the present case, a great deal turns on the ordinary course and practice of tramway travelling in Dublin. No evidence was given as to this. It was assumed that Judges and jurors (it being a Dublin case before a Dublin jury) were familiar with the matter. It was proved or admitted in the case that between two documents, the Board of Trade Regulations and bye-laws of the company, there were provisions to the following effect:—(A) No person shall remain on the platform. (B) No person shall enter or leave the car when in motion. As to both, the prohibition was absolute, and as to the latter, it was beyond doubt a regulation or bye-law that no person should enter or leave the car unless it was absolutely stopped.

Following the judgment of the Lord Chief Baron, I shall state my own experience of travelling in Dublin. I have been constantly using the trams since they started, and more and more as I got older. Except at the termini I think I may say that, unless I was prevented by other people mounting or dismounting before me, I practically never waited for the tram to stop, either when entering or leaving. As I got older I waited until it reached a lesser speed, but never for the complete stop. I have seen the vast majority of people do the same thing. Sometimes, in latter years, when I was about to enter or leave, the conductor would say, "Wait a moment, sir"; and then, when the speed was further reduced, I got on or left. I was never kept until the tram stopped. As to people standing on the platform, I have seen this allowed without objection continuously. A usual occurrence is for ladies to get up, and, there being no seats, to stand on the platform until men inside give them their seats and stand on the platform themselves.

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(1) I. R. 11 C. L., at p. 37.

I do not suggest that it is not competent for the defendants at any time to put these regulations in force, and decline to permit any person to enter a car until it absolutely stops. But until the person has notice that they intend to depart from their ordinary practice, and insist on the strict observance of the rule, I do not think that a person who has reasonably acted on the ordinary practice can be treated as a wrongdoer, still less as a mere trespasser.

Trams differ from railways in this vital matter. The railway ticket is taken and the fare paid, as a rule, at the station office before entering the train, and there are bye-laws to the effect that no person shall enter without a ticket; and at many places this is enforced by a barrier at the entrance to the platform. In the case of the tram there is no opportunity of taking the ticket before entrance, or until the conductor comes round.

What is the legal position of a person who enters the tram when at rest, or with the tacit permission of the company when it is moving fast or slowly, up to the time when he first has the opportunity of paying his fare? Surely he is there at the company's invitation to have the opportunity of paying his fare, and he is there lawfully, with their consent, to give them the opportunity of electing whether they will accept him as a passenger or not. When the tram is full, i.e., when it is intended that no more shall enter, the gate can be, and is frequently, kept shut. This is an intimation that further passengers will not be admitted. But if a passenger gets out, an intending passenger may surely assume that he will be allowed to take his place.

The conductor did not refuse to allow the plaintiff to remain on the car because he had entered it when it was in motion. He said, "You cannot get on" (this meant the platform); "the tram is full"; this was the ground for not accepting him as a passenger.

Was there any circumstance in the present case to lead the plaintiff to believe that he would not be accepted as a passenger when he got on the car? The car slowed down as it approached the usual stopping place, and a passenger got off, whom the company had, as far as he knew or could know, carried without objection. Was he not fully justified in assuming that he would be allowed to take that passenger's place? If there was room for him, there was room for the plaintiff. There were, it is true, some persons travelling on the platform, among them the witness Foley, plainly with the conductor's consent, as there is no suggestion that any objection was made to his staying there as he did. It was, therefore, a car on which the regulation as to standing on the platform was not enforced. In all these circumstances, can there be any doubt that when the plaintiff got on the moving car without objection from anyone he was lawfully on the car, and that he entered it with the consent of the defendants? At all events, was not there evidence from which a jury could find reasonably that he did so? There is a further fact of great importance. The plaintiff says: "There was, as far as I recollect, a helper on the platform." This man was treated during the argument as an official of the company in uniform, an assistant to the conductor. The jury were at liberty to believe this. If they did, it proved conclusively that the plaintiff entered the car with the defendants' consent. The company invite the public to travel in their cars. The only mode provided for this is to enter the car, and wait until the conductor demands the fare. Is there any doubt that the plaintiff entered the car with this intention? What other possible object could he have had? Can it be suggested that every person who enters a tramcar in Dublin can be treated as a trespasser until he has paid his fare? He is there at the invitation of the company, and therefore lawfully there. Apart, therefore, from the bye-laws, there can, I think, be no doubt that the plaintiff was lawfully on the car when the conductor came out and spoke to him. At all events, there was clear evidence from which the jury might infer so. There was also clear evidence that the jury might infer from the universal practice that the company allowed and permitted persons to enter and leave the cars in motion (possibly at their own risk), but that they did not refuse to receive them as passengers on this ground. I have never known a case of such refusal. As to the bye-law, this subjects the person violating it to a penalty. It does not make him a trespasser. If it did, *Delany's Case* (1) would have been a very simple one. If a man gets on a car going at two miles an hour at the express invitation of the conductor, or the implied invitation of the company, proved by their practice, the company cannot treat him as a trespasser. On the other hand, if, at his request, the conductor allows him to descend from the car at that speed, he cannot avail himself of the bye-law to treat this as misconduct or negligence on their part. So, even if he jumps off the car at a dangerous speed, unless, to use Lord Cairns' expression in *Bridge's Case* (2), he is "led" to do so by the company's servants.

Again, the bye-law or Board of Trade regulation is for the public benefit. It plainly is not confined to passengers. It applies to a person about to enter a car, who plainly is not then a passenger. As to leaving—does it not equally apply to every person who is on the car, whether passenger, invitee, licensee, or trespasser? Is not every person actually on a moving tramcar entitled to say, "I will get off when the tram stops, not before"? Is he under any obligation to do more when requested to get off, even though he should at the same time be liable to the penalty for having got on while the tram was in motion? This does not relieve the company from the obligation to allow him to remain on until the tram stops. His ignorance of the bye-law or regulation is immaterial for this purpose. He is not bound to say, "See Board of Trade regulations," but the company must be taken to know their own obligations under statutes, regulations, and bye-laws. If the man voluntarily consents to descend at a reduced speed, and is allowed to do so, of course he cannot complain. But if the conductor says you must get off now while the tram is going at its present speed, is not that, in view of the regulation, an absolute misfeasance as regards the plaintiff, an order to the man to do what he is by bye-law prohibited from doing, and which he is unwilling to do? So far I have treated the matter apart from all question of risk. Even on this basis, is it not a misfeasance, and that even as regards a trespasser, a fortiori in the case of a person lawfully on the car? As to the speed and practice on this particular line, Lord Justice O'Connor is much more familiar with it than I am, but we all know that it extends over eight miles to Dalkey, and that it competes with a railway running close to it the whole way. We may assume that they do not lose any time; some of the cars go the whole way, some only to Kingstown, and some, I think, to Blackrock; some stop more frequently than others. We know that there is very little traffic on the north side of Merrion Square. It is common knowledge that when a driver approaches a cross-street at which he does not intend to stop, he slows down until he reaches the point where he can see up and down the cross-street, and then if the way is clear he puts on the power, and the speed of necessity begins to increase imperceptibly at first, but more rapidly every second. This point here (I call it A) would be the corner of Merrion Street and Clare Street. The map shows that the distance from this to the corner where the plaintiff got in is about twenty yards; this point I call B. The point where the accident occurred I call C; it is about the middle of the house No. 11. The distances from the map are: A to B, 20 yards; B to C, 113, say 110; A to C, 133, say 130 If a tram were going ten miles an hour, it would do 280 yards in a minute; if five, 140. Now, at B the tram was slow enough to allow the plaintiff to get up without difficulty, say, two or three miles an hour, but the power had been on from about A; the plaintiff had not observed the increase of speed until later. He was employed getting safely on the car and shifting his position from the back to the front of the step, and preparing to get from

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(1) 30 L. R. Ir. 725.

(2) L. R. 7 H. L. 213.

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that to the platform. I think a jury could reasonably infer that at B the tram was going from two to three miles an hour, that the speed rapidly increased, and that it would be a very moderate estimate to say that the tram travelled from B to C at an average speed of five miles an hour. If so, the plaintiff was on the tram for 110 yards, which at this rate would be ¾ of one minute. A jury might come to the conclusion that it was less. The facts prove that at C it was going at a dangerous speed for descent, as there is no suggestion that the plaintiff was guilty of any negligence in the way he got off.

I now take the plaintiff's evidence and that of Foley, and divide the transaction into four stages, which I shall refer to as 1, 2, 3, and 4. Stage 1 was when the other man got off, and the plaintiff jumped upon the footboard, and had put his left foot up on the platform. Stage 2 was when "the conductor came from inside the car and caught hold of the iron gate and put it across." He said, "You cannot get on; the tram is full." Stage 3 was when, in reply to the plaintiff's remark that he was on the tram and a passenger had got off, the conductor said, "It does not matter; you must get off." Then comes the phrase, "The tram continued to go on, and began to move faster." Stage 4 was when the plaintiff asked the conductor to slow the tram, and said he would get off, and the conductor replied, "I will not; you must get off," in an aggressive tone. This evidence was entirely corroborated by Foley. [His Lordship referred to the evidence of the latter witness, and continued:—]

The last stage I shall refer to as the "final order." It is plain from the evidence of both the plaintiff and Foley that the only objection to the plaintiff was that the tram was full. No question was raised as to his having got on while the tram was in motion. It is equally plain that "you cannot get on" meant on the platform. There is no time mentioned, but I think the fair inference is that the short conversation which I have divided into 2, 3, and 4 was continuous, and that the plaintiff's reply to "the tram is full," that he had seen a passenger get off, was quite reasonable. That disposes of stage 2. Stage 3 then comes—"It does not matter; you must get off." This was the first order to get off. The plaintiff then perceived that the "tram began to move faster."

It is sought from this phrase to infer that there had been no increase in speed until stage 4. This the jury were in no way bound to accept. The obvious explanation is that it was the order to get off that directed the plaintiff's attention to the speed. Then comes stage 4: "I asked him to slow the tram and I would get off." He said, "I will not, and you get off," in an aggressive tone. "I dropped." Surely it is obvious that the request to slow was the reply to the first order to get off, and that the final order was the reply to this; that this portion of the conversation was continuous, and could not have taken more than two or three seconds. At all events, the jury were clearly at liberty so to infer. If so, there was only an interval of two or three seconds between the two orders to get off. As I have shown, the second order is demonstrated to be dangerous. Was it not at least fairly open to the jury to find that the first two or three seconds before were practically equally dangerous? I repeat here my fundamental principle. Yet one of the principal grounds on which the Judge non-suited the plaintiff was "that he could have got off when first directed to do so without any risk." He held that there was no evidence to go to the jury as to this.

In my opinion, the jury could most reasonably infer the following:—1. That the conductor's final language to the plaintiff was neither a request nor an invitation, but was an imperative order to get off at once. 2. That the conductor intended it to be obeyed, and that the plaintiff so understood it. 3. That the order, in fact, was the direct cause of the plaintiff's leaving the car. 4. That the conductor (*a*) knew, or (*b*) ought to have known, that obedience to the order would be attended with serious risk to the plaintiff. 5. That the plaintiff was offered no alternative of remaining on the car. 6. That the two orders were made within two or three seconds. 7. That the entire conversation was continuous, and did not occupy more than a few seconds, and that therefore when the conductor first came out the speed of the tram must have been such as to make it dangerous to alight. 8. That the order was a reckless, brutal order, such as would be unjustifiable in the case of a trespasser. In my opinion it would have been legitimate for the jury to have found all these propositions in favour of the plaintiff, particularly in view of the fact that the defendants declined to give any explanation or account of the matter. One inference, I think, any jury would certainly make, i.e., that no conductor would ever permit a person to remain on the car on condition that he remained on the step. This would be the most complete proof of actionable negligence. It was seriously argued that the step was a safe and proper place to travel on, but in my opinion the plaintiff's statement, "I would have been quite safe if I had not been meddled with," only meant, "I could have held on for a bit." At least a jury could have so inferred. The Judge has found that there was no evidence for the plaintiff to go to the jury on any of these eight matters. I repeat again my fundamental principle.

A considerable portion of the argument for the company was based on the view that the plaintiff's evidence was false, and that in his account of the matter he fraudulently concealed its true nature; that the truth was, he wanted the car stopped or slowed because he wanted to be put down near the corner where he got up, and did not want to be carried to the further corner of the square, as he would have a better chance of finding room in a Blackrock tram at the first than at the second corner; that he was really offered the option of remaining on the step until the next corner, where the tram would stop, and he could get off; that rather than do this he voluntarily decided to drop off at his own risk; and that his request to slow or stop the car was not for safety at all, but simply to get off near the corner. This extraordinary contention seems to some extent to have been accepted by the learned Judge. Of course, the plain and obvious answer to the whole of it is that the jury were at perfect liberty to believe that the plaintiff's evidence, corroborated as it was by Foley, was true and honest, and that there was no fraud or sham or false pretence about it. In the next place, there was no cross-examination suggesting anything of the kind. In the next place, if the plaintiff had the object suggested, why did he not get off if he thought there was no risk? I cannot even understand how it can be suggested that the case could be withdrawn from the jury on any of these grounds.

The defendants' counsel, Serjeant Sullivan, repeated and insisted on two propositions—1. That the plaintiff was offered the alternative of either getting off or remaining on the car (I understand by that the step) until the next stop—where that was I could not ascertain—he did not state the corner of the square as the Judge did. 2. That a conductor cannot judge whether it was safe to alight at any time; that the passenger is the only person who can do so. This astounding proposition he insisted on with great force, saying that the passenger is the only person who knows his powers in this respect. I should like to see the faces of a jury of tram conductors on hearing this. Every day conductors form such judgments, and by their care and caution in protecting people from the effects of their incapacity to form a correct judgment of their own prevent any number of accidents. At all events, the jury were at liberty not to accept counsel's proposition. His first proposition is, of course, the direct contrary of the evidence; but what I think he meant by it was that it was open to the plaintiff to disobey the order, and that the fact of his obeying it under the circumstances was such gross negligence on his part as to be the sole cause of the injury; that the conductor could not form an opinion whether it was dangerous or not; the plaintiff was the only person who could; that the only view a jury could take of the evidence was that the conductor intimated to the plaintiff that he might get off if he thought he could do so safely, but that if he did not he would be allowed in fact to remain where he was.

When this man, hanging on to the step of this tramcar, whose speed was rapidly increasing, got the final order to get off, that he would not be allowed to remain any longer, what was he to do? Carefully consider the pros and cons. Thus, "If this man means what he says—and he seems to be in earnest—it would be better for me to go at once, for it is getting more dangerous every minute. Still, on the other hand, perhaps he will think better of it when he sees the danger, and in the end allow me to remain, and stop soon. It requires careful consideration, and I am in great doubt as to whether it would not be better for me to wait and see what he will do; but if I am wrong, and he sticks to his word, it will be terrible to have to get off when the speed has increased. I suppose the tram will not stop at the corner, as it did not stop at the other." Mr. M'Grath suggested a further motive: "If I leave the car while it is in motion, I shall be liable to a penalty." This was a very bad point in the case of the man who had entered the car in motion, with no compulsion to do so. But, as Lord Justice O'Connor said at this stage, "Let us come to realities."

The first fact is that the plaintiff was not asked a single question on cross-examination as to why he obeyed the order. If he had been asked, he would probably have said, "I had no time to think. I dropped off because I was ordered to do so." Mr. M'Grath was asked what motives he suggested to the Judge. These, of course, would be the results of Mr. M'Grath's imagination. He remembered the bad point, and he said he did not remember whether he suggested fear of violence. I asked whether there was any case in which a person who, with power to enforce it, gave an order intending it to be obeyed, and it was obeyed, was permitted to escape the consequences by saying you ought not to have obeyed it. No such case was produced. If the order was so monstrous that no person would have obeyed it, does that relieve the person who intended it to be obeyed? It only proves that it would be actionable if so given to and acted on by a trespasser. I shall deal further with this matter when I come to *Delany's Case* (1).

The Judge's summary of the reasons for his ruling is very remarkable for two things. He entirely ignores (*a*) the plaintiff's request that the car should be slowed or stopped, and (*b*) the final refusal to allow the plaintiff to remain any longer on the car. He finds as a fact (*c*) that the plaintiff "could have got off when first directed to do so without any risk." This was plainly for the jury. He finds as a fact (*d*) that the plaintiff "could well have remained where he was [i.e. on the step] till the car stopped at the other corner of Merrion Square." As to this there was absolutely no evidence, and no ground for suggesting that the car would stop at the second corner of Merrion Square when it did not stop at the first. And, in the next place, unless he ignored (*b*) he must have found as a fact that the plaintiff would have been allowed to remain where he was, although the conductor had emphatically told him he would not, and that there was no evidence to go to the jury for the plaintiff in respect of any of these matters.

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(1) 30 L. R. Ir. 725.

I shall now refer to a few of the authorities, and, first, as to the effect of the practice of the company in relation to the plaintiff's position. Common sense tells us in the present case that the universal practice adopted by the company, and known to everyone in Dublin, cannot be ignored. In *Great Northern Railway Co.* v. *Harrison* (1) the facts were as follows:—I read from Beven on Negligence, 3rd ed., vol. ii, p. 950. [His Lordship read the facts as there stated, and continued:—] Coleridge J., in giving judgment, said:—"The practice which had prevailed was not conclusive of this, because it was not conclusively shown to have been known by the defendants or any officer authorized to permit it; but there was evidence of such knowledge, and on which the jury might find it to have existed; and if the jury should be of opinion that this irregular use of the tickets, however worded, was with the knowledge and permission of the superintendent of the station whom the defendants placed there to regulate such matters, this would be such evidence of a licence as would make it wrong to say that the plaintiff was a trespasser in the carriage" (p. 381). This judgment has been often referred to, and never questioned.

Next I would refer to the "invitation to alight" cases. It was suggested during the argument that they were inapplicable, because they only applied to cases where the danger could not be perceived by the plaintiff, as in *Bridges* v. *North London Railway Co.* (2). I shall first refer shortly to two Irish cases: *Thompson* v. *Belfast, Holywood, and Bangor Railway Co.* (3), and *Nicholls* v. *Great Southern and Western Railway Co.* (4). In *Thompson's Case* (3), where there was an "invitation to alight," it did not appear that there was any want of light on the arrival of the train at the terminus, and the plaintiff had full opportunity of perceiving the danger. In *Nicholls' Case* (4) the facts, as stated in the judgment of Lawson J., were as follows:— [His Lordship read the facts, and continued:—] There the jury found in favour of the plaintiff, and the verdict was sustained, the Court holding that there was

(1) 10 Ex. 376.
(2) L. R. 7 H. of L. 213.
(3) I. R. 5 C. L. 517.
(4) I. R. 7 C. L. 40.

evidence for the jury that there had been an invitation to alight. Compare that with the present case. There the inference was drawn that there had been an invitation to alight. Here two specific orders were given: "Get off; I won't let you remain here."

The first of the English cases to which I shall refer—*Foy* v. *London, Brighton, and South Coast Railway Co.* (1)—is of importance, as being the only case which I can find where there was an express invitation to alight. There the plaintiff was actually desired by a porter to alight at a spot a little below the end of the platform. The verdict of the jury in favour of the plaintiff was upheld by the Court of Common Pleas on the ground that it was for the jury to say whether or not the company was guilty of negligence in not providing reasonably convenient means of descent. In *Siner* v. *Great Western Railway Co.* (2) the verdict in favour of the plaintiff was set aside, the majority of the Court holding that the plaintiff's injuries were sustained by his own voluntary act in jumping from the carriage, and that there was no evidence of negligence on the part of the company. Mellor J., in the course of his judgment, said:—"The defendants might have been requested to back the train, but there is no evidence that any such request was made or intended to be made." In the present case the plaintiff requested the tram to be slowed down to enable him to alight.

It may be dangerous to alight from vehicle, train, or tram either because the place is dangerous, or the speed at the time is dangerous. The effect of an express or implied invitation by the defendants to alight would seem to me on principle in both cases the same. In the case of a railway it is generally dangerous from the nature of the place. In the case of tramways the place is safe enough; the danger is from the speed of the tram. As I have said, I have found only one case, *Foy's Case* (1), of express invitation to alight. In the other cases the question has been whether an invitation to alight can be presumed from all the circumstances of the case. Where the invitation is found the company appears always to be held liable. But if the danger is obvious, it is difficult to imply the invitation. As to *Delany's Case* (3), the fundamental difference between it and the present case

(1) 18 C. B. (N. S.) 225. (2) L. R. 4 Ex. 117. (3) 30 L. R. Ir. 725.

is this:—there, when the dispute arose between the plaintiff and the conductor, the plaintiff was in a position of safety on the ground. FitzGibbon L.J. puts it at page 750:—"The plaintiff was acting unlawfully in trying to get up; the conductor was acting lawfully in preventing him." Mr. Beven on this passage says (page 147):—"But there was evidence that plaintiff had both feet on the car." On this Sir G. Jessell has said more than once that when you want to get the legal principle of a judgment you must take it as applying to the facts as understood by the Judge. Lord Ashbourne and Lord Justice FitzGibbon both decided the case on the ground that the transaction could not be split up into parts; that a line could not be drawn and a fresh start made, even if he had succeeded so far in his original unlawful attempt as to "have forced his way" to the step, "or even to the platform." Here the admitted dispute began when, without objection, in the absence of the conductor, and (there was evidence to this effect) in the presence of and without objection by the helper, the plaintiff was on the car. The substantial difference between the Lord Chief Baron and the Court of Appeal was that they thought a fresh start could not be made in the dispute at this point. The Lord Chief Baron and Murphy J. thought it could. Reading the entire judgments of the majority, the case seems to me a clear authority for the proposition that if the plaintiff had got on to the car without objection the decision of the Court of Appeal would have been the other way. FitzGibbon L.J. sums up the evidence thus:—"One and all amount, in my opinion, to this only: the plaintiff tried to get into the car while in motion; the conductor prevented him, and the plaintiff was injured." What would he have held if the plaintiff had got on the car without objection when the dispute began? He could then only be prevented from moving to another part of the car, or active steps might be taken to cause him to get off. FitzGibbon L.J. says:—"Of course, if he could have shown, as he pleaded, that he was lawfully on the tramcar and was thrown off, the liability of the company would be clear."

The Lord Justice thought he could not show this. Why? We find the answer on p. 748:—"It was his duty to let go the moment the conductor indicated an objection to his getting up.

It was his duty not to have caught the rail at all." This was what made him a trespasser from the start. The Lord Chief Justice in this case said that the bye-law against entering a car in motion is more honoured in the breach than the observance. The most complete proof of this is, I think, to be found in the fact that in so bitterly fought a case as *Delany's* (1) no one in either Court, counsel or Judge, ever thought of suggesting that if the plaintiff had entered the car without objection the mere fact that he entered it when in motion would have made him a trespasser. The whole case is really an authority that it would not. In the next place, Lord Justice FitzGibbon's statement, at p. 748, as to the duty to obey the direction of the conductor is important. It will be observed that he attributes the plaintiff's injuries to his refusal to obey this direction. Here they arose solely from his having obeyed the final order. It is a clear authority for the application of the principle of *The Bywell Castle* (2) to the present case. Apply to the plaintiff, when he got the final order to get off, Lord Ashbourne's observations at p. 745: "It may be that if the time was longer, if there was more opportunity for deliberation and for balancing alternatives, the conductor might have thought of another alternative for getting rid of the intruder; but in the hurry of a crisis brought on by the plaintiff's own reckless and negligent conduct it would be unreasonable and unjust to exact from the conductor the most rapid and most exceptional presence of mind as the condition for exempting his employers from liability"; and Lord Justice FitzGibbon's at pp. 750, 751: "I deny that, in dealing with a wrong-doer, the company can be held liable for a mere omission or error of judgment on the part of their servant . . . At best, there was only an error of judgment on the conductor's part"; and he quotes the judgment of James L.J. in *The Bywell Castle* (2): "A man has no right by his own misconduct to put another man into a situation of extreme peril, and then charge that other man with misconduct. My opinion is that if, in that moment of extreme peril and difficulty, such other man happens to do something wrong, so as to be a contributory to the mischief, that would not render him liable for the damage, inasmuch as perfect presence of mind, accurate judgment, and promptitude under all circumstances are not to be expected."

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(1) 30 L. R. Ir. 725.

(2) 4 P. D. 223.

The great principle stated by Barry L.J., at p. 753, is not dissented from by the other members of the Court: "We take one great principle of the common law to be that, though it sanctions the defence of a man's person, liberty, and property against illegal violence, and permits the use of force to prevent crimes, to preserve the public peace, and to bring offenders to justice, yet all this is subject to the restriction that the force used is necessary; that is, that the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by, or which might reasonably be anticipated from, the force used is not disproportioned to the injury or mischief which it is intended to prevent." The quotation is from the Report of the Criminal Code Commission (Lord Blackburn, Lord Justice Barry, Lord Justice Lush, and FitzJames Stephens J.), at p. 11. In my opinion, the principle applies with equal force to civil matters. *Delany's Case* (1), so far as it is against the plaintiff, is the opinion of the Lord Chancellor and FitzGibbon L.J., opposed to that of the Lord Chief Baron, Lord Justice Barry, Murphy J., and Andrews J. The opinion of the former must be taken by us to be the law. Mr. Beven states at p. 146: "An appeal to the House of Lords was abandoned. This is to be regretted, since the decision as it now stands is out of harmony with the authorities." In these circumstances, I am at liberty to say that I will not extend the case to one which I think I have shown differs from it in almost every material particular, and which the same Court would possibly, if not probably, have decided the other way. I have dealt with it in detail, as Mr. Justice Moore's careful judgment really treats it as conclusive in the present case. I wish to add one word in conclusion. I have made some strong observations on the evidence, but on this appeal we have had before us the evidence of one side only, and if the case should go to a new trial, this fact must be borne in mind, and anything I have said as to drawing inferences of fact in favour of the plaintiff, having regard to his uncontradicted evidence, would have no application, and should not be introduced in the event of the defendants electing to give evidence.

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(1) 30 L. R. Ir. 725.

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Let me assume, in the first place, that the plaintiff, after boarding the tram, was a trespasser. He is told to get off; he reminds the conductor that there is a vacant place, a passenger having just dismounted; the conductor refuses to accept this plea for admission, but again orders him off; as the tram has gained in speed, the plaintiff asks the conductor to slow down to enable him to get off—a request, I may remark, which was not only obviously prudent, but eminently reasonable as well, there being a white post at No. 17, a few doors further on; the conductor refuses, and for the third time and in an aggressive tone orders the plaintiff off. Now, here was a peremptory order from a person in authority, armed with the necessary powers to enforce it, to get off, and to get off there and then. Was the plaintiff to stay where he was, with the prospect of having these powers exercised and of being physically forced off the moving tram? In the emergency he did what a jury might well think any reasonable man would do in the circumstances—he dropped off lest worst should befall. In my opinion, if a jury so conclude, there is evidence to sustain the finding, and the finding imports liability on the defendants, for the case, as I conceive it, is just the same as if the conductor had carried out the threat implied by his language and demeanour, and had physically ejected the plaintiff from the car. We are told by counsel for the defendants that before he dropped off the plaintiff should have weighed the pros and cons of the two alternatives with which he was confronted, and that if he had done so he would have preferred to have brazened it out with the conductor rather than to have descended from an accelerating tram. This involves the notion, I suppose, of an instantaneous calculation of the speed of the tram, of the effect of the momentum imparted to his own avoirdupois by the speed, of the condition of the roadway on Merrion Square, and of the chances of a man of sixty escaping injury by using his legs so rapidly as to project them forward into space with a velocity equal or nearly equal to that of the rest of his body. And this mental process would not stop there, for he would have to size up the

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conductor—to speculate, if you please, upon whether that official meant what he said, or whether his language was merely his polite way of intimating that the plaintiff should remain where he was until the indefinite time when the tram might stop, to measure the conductor's fighting weight, and to divine what would be the result of the threatened practical exercise of his authority.

As I conceive it, the law puts upon human nature no obligation in a crisis to make such lightning calculations and nice decisions, even when that human nature is embodied in a trespasser. Humanity, as well as the law, forbids one to injure a trespasser merely because he is a trespasser; a fortiori one cannot injure a man who is anxious and willing and doing his best to discontinue his trespass. One cannot lawfully injure him in any fashion, whether that fashion be the actual use of physical force, or the display or exercise of power and control in such a way and in such circumstances as put a reasonable man, anxious to avoid an encounter, in the way of danger.

For these reasons I am of opinion that even if the plaintiff were a trespasser, there is a question for the jury to try. I wish to say on this point that my recollection of what took place in this Court is not quite at one with that of the Lord Chancellor. Mr. M'Grath, no doubt, did admit that he did not specifically argue at the trial that the alternative to the plaintiff's refusal to comply with the conductor's order was the use of physical force, but I did not understand him to go further; indeed, I gathered that the case for the plaintiff was at the trial the same as it is now, namely, that the plaintiff was practically ejected from the tram. The judgments in the King's Bench Division show conclusively that it was the point argued there. I am, however, far from saying that the plaintiff was a trespasser on the occasion, for I think it was for the jury to say whether he was or not. In answering this question they will have to take into account all the circumstances, including, 1, the paper prohibition of entry upon a moving car; 2, the actual permission, in practice, of entry upon a moving car, and the acceptance of a person so entering as a passenger (I agree with what Molony C.J. and my colleague Ronan L.J. have said as to this); 3, the slowing down of the car as it came to Merrion Square; 4, the non-stopping of the car at the usual stopping place; 5, the dismounting of a passenger there; 6, the fact that the gate had not been pulled across before the plaintiff got on the step; 7, the fact that the assistant-conductor made no objection when the plaintiff boarded the car.

These facts may, or they may not, induce a jury to come to the conclusion that a reasonable man would be justified in thinking that there was an invitation to him to come aboard for the purpose of taking his passage. But the matter is one for a jury, and I think, as the evidence stands, a verdict either way would be such as a reasonable jury might find.

On this branch of the case also I concur in substance with what has been said by Ronan L.J., and I also agree that there must be a new trial.

Solicitor for the plaintiff and appellant: *Charles J. Murray.*

Solicitors for the defendants: *Casey, Clay, & Collins.*

R. ST. J. C.

K. B. Div.
1919.
Nov. 3, 4, 19.

LAWRIE *v.* WOODS (1).

Emergency legislation—Landlord and tenant—Recovery of possession—"Standard rent"—Rates paid by landlord—Increase of Rent and Mortgage Interest (Restrictions) Acts, 1915–1919 (5 & 6 *Geo.* 5, *c.* 97; 8 *Geo.* 5, *c.* 7; *and* 9 *Geo.* 5, *c.* 7).

A lease existing on 3rd August, 1914, reserved a rent of £58, free of all taxes. *Held*, that £58 was the standard rent within the meaning of the Increase of Rent and Mortgage Interest (Restrictions) Acts, 1915–1919 (5 & 6 Geo. 5, c. 97; 8 Geo. 5, c. 7; and 9 Geo. 5, c. 7).

New Trial Motion.

The action was one to recover possession of the house and premises known as "Aviemore," No. 6 Eva Villas, Victoria Road, Clontarf, in the City of Dublin, which were held by the defendant as tenant to the plaintiff, under an agreement in writing, dated 28th February, 1916, and made between the plaintiff and the defendant for a term of three years from the 1st March, 1916, at the yearly rent of £56.

The defendant refused to give up possession, and pleaded that she was a tenant in occupation of premises to which the Increase of Rent and Mortgage Interest (Restrictions) Acts, 1915 to 1919, applied; that she had paid the rent and observed the other conditions of the tenancy, and she relied on the provisions of the said Acts, viz., 5 & 6 Geo. 5, c. 97; 8 Geo. 5, c. 7; and 9 Geo. 5, c. 7.

The action was tried before Mr. Justice Pim, without a jury, on the 27th May, 1919, and the learned Judge, in the course of his report, says:—

It appeared that by an agreement for a lease, dated 1st July, 1910, one Nolan had demised the lands in question to one Watson, at a rent of £58, free of all taxes. This agreement is in evidence.

On the 9th July, 1910, Nolan assigned the landlord's interest to the plaintiff, and the interest of Watson afterwards became vested in the defendant. George Watson is dead, and the defendant is his personal representative.

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(1) Before Dodd, Gordon, and Moore JJ.

On the 28th February, 1916, an agreement was entered into between the plaintiff and the defendant, whereby the lands were leased to the defendant by the plaintiff for three years, from 1st March, 1916, at a rent of £56, including all rates and taxes. This agreement is in evidence.

In February, 1919, the premises were put up for sale, and under the conditions of sale the plaintiff was bound to deliver clear possession of the premises to the purchaser.

By the Increase of Rent and Mortgage Interest Act, 1915 (5 & 6 Geo. 5, c. 97, sect. 2, sub-s. 1), it is enacted that the standard rent means the rent at which the dwellinghouse was let on the 3rd day of August, 1914, and by sub-s. 2 the Act only applies to houses in Ireland where the standard rent or the rateable value does not exceed £26 annually.

By the 9th Geo. 5, c. 7, this figure of £26 is raised to £52, but the definition of standard rent remains the same.

The plaintiff was examined, and he stated that he had purchased the lands in 1910; that when George Watson had been tenant, he, the tenant, had paid the rates, and had paid to him, the plaintiff, the rent of £58, less by the amount of the said rates.

This statement was corroborated by a witness on behalf of the defendant.

. . . . . .

I held that the rent referred to in 5 & 6 Geo. 5, c. 97, and in 9 Geo. 5, c. 7, was the rent specifically reserved by the agreement, and I gave judgment in favour of the plaintiff.

The application to set aside the judgment, or for a new trial, was on the ground, amongst others, that the learned Judge misdirected himself in the law applicable to the evidence given upon the trial of the action.

J. Henry, for the defendant :—

Rent is defined in sect. 1 of Deasy's Act as "any sum or return in the nature of rent, payable or given by way of compensation for the holding of any lands"; and a similar definition is given in Woodfall, p. 449, following Co. Litt., 142*a*. "Rent" is the sum left when, from an inclusive rent, the tenant's rates, payable by the landlord, are deducted: *Sheffield Waterworks Co.* v.

Bennett (1), and "rent" and "annual value" are used indiscriminately (ibidem). Therefore, the standard rent is the return which the landlord was actually receiving as a profit rent on August 3rd, 1914.

If the plaintiff's contentions were correct, the Acts would be inconsistent, for take the case of two houses similar in all respects, the one where the landlord pays the rates would be outside the Acts, and the other, where the tenant pays them, and the rent is less in consequence, would be within the Acts. Moreover, sect. 2, sub-s. 3, of the Act of 1919 provides that the increase of 10 per cent. permitted by that section shall be in addition to any increase permitted by sect. 1 of the principal Act. On the plaintiff's construction it would be possible to increase a composite rent of this kind (*a*) by the amount of the increase in rates under sect. 1, sub-s. 1, iv, of the 1915 Act, as well as (*b*) by 10 per cent. of the composite sum under sect. 2, sub-s. 3, of the 1919 Act, which would clearly be inequitable.

[Also cited *Lloyd* v. *Keys* (2); *In re Richmond Justices* (3); *Smith* v. *Corporation of Birmingham* (4); Vanston's Local Government, 2nd ed., vol. i, p. 73.]

Bartley, for the plaintiff:—

The principal argument of my learned friend is founded on a supposed grievance. He says that if the rates and taxes are not taken into account in determining the amount of the "standard rent," the result would be that a tenant who, as in the present case, pays £56 a year rent, the landlord paying the tenant's rates and taxes, amounting to over £16 a year, is outside the Act, while his next-door neighbour, who occupies a house exactly similar, of the same annual value and of the same letting value, but who pays his own rates and taxes and a correspondingly smaller rent to the landlord, is within the Act; and Mr. Henry says the grievance is so great and manifest that the Legislature could not possibly have contemplated its existence. But when the Legislature determined to make rent, as distinct from valuation, an element in determining whether a tenancy was or was not within the Act, the grievance referred to became inevitable. The grievance originated in the arrangement made between the landlord and tenant, in accordance with which the landlord undertook to pay the tenant's rates and taxes, which arrangement was made for the benefit of the tenant, as it was known that the tenant's rates and taxes would be likely to rise. Suppose a landlord has a house which he could let at £60. He lets it at £50, and gets the tenant to contract to do all the repairs for which the landlord is legally liable, amounting to £10 a year. Would Mr. Henry suggest that the landlord should be allowed to say that the real rent was £60, and that the case was excluded from the Act? An exactly similar point would arise when a landlord had a house which he could let at £60 and let it at £50 to a relation of his own, or to some person whom he desired to befriend. A landlord and tenant when entering into their contract of tenancy may take into consideration any circumstances they please as to who is to pay any rates or taxes, as to who is to do repairs, as to whether a fine is to be paid or not; but when they fix on a particular sum, which both agree to describe in their contract as rent, that is the sum which is the rent within the meaning of the Increase of Rent Acts. The term "standard rent" is defined in sec. 2 of the Act of 1915, and the term is used throughout this Act to avoid the necessity of repeating in every place where the term occurs the definition given in sec. 2. The exact point raised in this case by Mr. Henry has been decided by Mr. Justice Bray in the *Westminster and General Properties and Investment Co., Ltd., and another* v. *Simmons* (1). Mr. Justice Bray states in his judgment: "The question was, what was the standard rent at which the premises were let on August 3, 1914? The lease set out the rent at £80 a year. That was prima facie the rent. The fact that the lessee undertook the burden of paying the rates did not give any right to the tenant to a deduction from the rent in order to ascertain the standard rent." This is the only case in which the exact point now under consideration was decided, but there are many cases in which the Court had to determine, and did determine, the amount of the standard rent, and in all these

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(1) [1872] L. R. 7 Ex. 409 and 8 Ex. 195.

(2) 34 I. L. T. R. 150.

(3) 10 T. L. R. 68.

(4) [1883] 11 Q. B. D. 195.

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(1) [1919] W. N. 241; 35 T. L. R. 669.

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cases the Court held the standard rent to be the sum mentioned in the agreement as rent without any regard to whether the landlord paid the tenant's rates and taxes or not: See *Rees* v. *Marquis of Bute* (1). In determining what is rent, the true test is what is the sum in respect of which the landlord can distrain: *In Re Richmond Justices* (2). In the present case the landlord could have distrained for the rent of £56 without any deductions. The standard rent may be a weekly, monthly, or quarterly, or other periodical rent. It might be necessary for the landlord to distrain before the amount of the rates could be ascertained. The landlord is bound under a penalty to disclose the standard rent. But if Mr. Henry's argument is correct, it would be necessary in every case to have a judicial inquiry as to what the standard rent was.

Cur. adv. vult.

DODD J.:—

The judgment of the Court will be delivered by Mr. Justice Moore. Our judgment follows the decision of Bray J. in *Westminster and General Properties Co.* v. *Simmons* (3); but each member of this Court has considered the point raised in this case, independently of that decision, and we have come to the same conclusion.

MOORE J.:—

This action was one for recovery of possession of certain premises known as Aviemore, Clontarf, consisting of a dwelling-house.

The premises were let for a term of three years from the 1st March, 1916, at the yearly rent of £56, the tenant paying taxes, by agreement in writing of 28th February, 1916. On the expiration of this term the defendant refused to give up possession, whereupon the present action was instituted on the 23rd April. The defendant claims to be entitled to retain possession by virtue of the provisions of the Increase of Rent and Mortgage Interest (War Restrictions) Acts, 1915–1919, the last of which received the Royal assent on the 2nd April, 1919, hereinafter referred to as "the code."

Mr. Justice Pim, who tried the action, finds that on the 3rd

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(1) [1916] 2 Ch. 64. (2) 10 T. L. R. 68. (3) 35 T. L. R. 669.

K. B. Div.
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Moore J.

August, 1914, the premises were held under a lease, now expired, at a rent of £58 per annum, the landlord paying all taxes, in which, I presume, rates are included.

Assuming, as both parties have invited us to assume, that, notwithstanding sect. 52, sub-s. 2, of the Local Government Act, 1898, this was a valid contract (which I do not decide here), the question for us is, having regard to the Increase of Rent Acts, what was "the rent" paid on 3rd August, 1914, because such rent became "the standard rent" under sect. 2, sub-s. 1, of the Act of 1915 (provided the valuation did not exceed it, as provided by sect. 4 (v) of the Act of 1919).

I should also say that where the landlord was bound to pay all rates, any payment of them by the tenant for which credit was given by the landlord as against the rent is treated by me as a payment by the landlord.

If the standard rent on 3rd August, 1914, exceeded the limit of application of the Act (extended by sect. 4 (c) of the Act of 1919 to £52 per annum), then the defendant is outside the benefit of the Act; if, on the other hand, the standard rent was then within the limit, the defendant succeeds in the action. The learned Judge has decided that the standard rent was £58, and, therefore, that the defendant fails. The present motion seeks to set aside that finding.

Mr. Henry, for the defendant, has argued before us that as the landlord on 3rd August, 1914, receiving the rent of £58, was obliged to pay thereout the sum of £16 18*s.* 8*d.* for rates and taxes (an amount not to be found in the report of the trial, but apparently admitted at the Bar), he (the landlord) only received a net sum of £41 1*s.* 4*d.* in the year; and that, on the true construction of the Acts, this, and not the sum of £58, became the standard rent, or to summarize that the standard rent must be a net rent, at least quoad the rates. A reference to Stroud's Dictionary (Title, "Rent"), as pointed out by my brother Gordon, shows that in statute after statute the word "rent" has a varying meaning. Even in the Conveyancing and Law of Property Act, 1881, where it is, inter alia, applied in respect of the right to get or sell coal or other minerals at so much per ton, it has not the ordinary meaning.

We must, therefore, find out in what sense the word is used in the present code. I take the prima facie meaning of "rent" to be in this country within the definition in the 1st section of the Landlord and Tenant (Ireland) Act, 1860, and that it includes "any sum or return in the nature of rent payable or given in compensation for the holding of any lands." This definition does not provide for any deduction of charges, and, to my mind, it is prima facie a gross rent, and not a net rent, certainly in a case such as the present, where the tenant is not authorized by his contract to make deductions; and in point of law, while it lies on Mr. Henry to satisfy us that in the code the word "rent" is used in any more extended or restricted meaning, it is our duty to consider the code to see if it affords any reason for reading the word "rent" in the special sense of "net rent," differing from its ordinary meaning: see Lord Esher M.R. in *Barlow* v. *Ross* (1).

Mr. Henry chiefly bases his argument on the parallel grounds of absurdity or inconvenience if a contrary construction to his own were given. He says that there might be two houses side by side of equal value, A and B. That as to A, the tenant paid £50 a year and also the rates, and this would obviously be within the limitation. That as to B, the tenant paid £60 a year and the landlord paid the rates, and the tenant would be without the limitation—an inequality never intended by the Acts. This—I speak subject to correction—was his main contention. I do not think on examination that it is valid. The argument bases the alleged inequality on the assumption that both houses were on August 3rd, 1914, of equal value.

Now, under the principal Act—to which, as being the principal Act, we must have most regard—if both houses were of the same annual value, and that value were within the limit of the Act, then, irrespective altogether of the difference in the rents, both houses would be within the benefit of the Act of 1915. His contention, therefore, fails as to the principal Act.

But treating it as arising under the amending Act for the extended period, how does the matter stand? Parliament, in 1919, extended the duration and subject-matter of the Act of 1915. They brought in a new class of people, who certainly at

(1) 24 Q. B. D. 381.

the beginning of the war would not have been considered as small householders. The limit in London is £70 rent, in Scotland £60, in Ireland £52. This class is one obviously in better circumstances, and better able to protect itself than the small occupier at £26 per annum, for whom the principal Act was intended.

I think it was reasonable for the Legislature, if it so desired, to impose on this class, in restraining the landlord's legal right to re-enter on the expiration of the tenancy, some restriction not applicable to the lower rate of occupation, and, having fixed the limit at a sum not exceeding £52, it was provided that, to qualify for its benefits, neither rent nor valuation should exceed it. Had this not been done, it would have been open for a tenant, holding at an annual value of £60, and a rent of £51, to get the benefit of the Act, which could not be intended, as it would show the rent of £51 was only artificially within the limit, and the valuation clearly beyond it. This does not involve an unjust or absurd result, as is contended. It must also be remembered that the code does not purport to be anything more than a temporary provision originally designed to meet a war emergency. It only applies to tenancies otherwise capable of being determined by notice to quit, or by efflux of time, and to new tenancies created after the Act. I have no doubt that if the code was to become permanent, it would be made possible in such cases as those relied on by Mr. Henry, where the difference is one rather in form than in substance, that such inequalities in course of practice would very speedily adjust themselves to the requirements of the statute.

But there is another argument, based on convenience, which goes, I think, to support the view of the learned Judge, that the reserved rent is the standard rent. The standard rent is not in figures, as in a scale, the standard for a class; but it is the standard test for each individual tenement, ascertained on general lines. Simplicity is required for a standard where possible. If the rent reserved is the test, or the valuation, they are both easily ascertained—the first by production of the lease or agreement, or equally by the tenant's receipt for rent; the second by the ordinary certificate of valuation, to which we are well accustomed in this country.

If, on the other hand, "rent" means a net rent, or rent from which rates are to be calculated and deducted where the landlord pays them, and means the amount received by him as a profit rent merely out of the premises, then there would necessarily be an inquiry in each case to ascertain what in fact was paid and deducted in 1914, and properly deducted in the landlord's books, before arriving at a net rent. It might involve in 1920 a reference to the local authority to ascertain the landlord's share of rates in 1914. I do not think the Legislature intended without clear words to put the parties to the inconvenience of such an inquiry. And if there is to be any inquiry into net rent, it might also include all other proper outgoings payable by the landlord. What these outgoings may be will be found discussed in the Court of Appeal in *Duke of Cleveland's Estate, Wolmer* v. *Forester* (1).

After what I have already said, I am somewhat chary of reference to other Acts of Parliament, because, unless they are in pari materia, they may prove false guides. But there is a case under a statute somewhat resembling the present, where "rent" prima facie is used, as in Deasy's Act, and where its amount may be calculated at a reduction in order to keep within a statutory limit to which statutory rights are attached. I refer to the right of the middleman paying and also receiving rent to surrender, given by the eighth section of the Land Law (Ireland) Act of 1887. "Rent" is used in the ordinary sense in the opening parts of that section, and when we read sub-s. 3 for purposes of calculating the true amount of the rent received, it is found that the middleman is expressly authorized to deduct 20 per cent. from the gross rent for cost of collection and other outgoings. The defendant asks us here to construe the present Acts as though they contained a corresponding statutory power of deduction for rates in calculating the standard rent, but they do not.

Turning to the other sections of the present code, I find in sect. 2 of the Act of 1919 power to the landlord during the extended period to increase the rent by an amount not exceeding 10 per cent. of the standard rent. I do not think that this can mean 10 per cent. on the net rent after outgoings

(1) [1894] 1 Ch. 164.

deducted. Rates with which the tenant has no concern, where the landlord pays them, might vary with the locality, so as to cause the very inequalities Mr. Henry relies on; and it will be noted that this very power of addition is added to the further power that the landlord has of making a further increase in the rent in proportion to the increase of rates: Act, 1915, sect. 1 (iv).

After all, while the landlord's rights of dispossessing the tenant and of raising the rent are taken away from him by the code, or can only be exercised by him under restrictions designed for the protection of the tenant, the latter remains a free man, and can throw the premises on his landlord's hands at any time when it is to his advantage to do so.

In the sense that net rent means a profit rent, there is in the code only one provision involving such an inquiry as would determine this question. Lettings, including the use of furniture, were excluded from the Act of 1915, sect. 2, sub-s. 2. But such lettings are brought into the code by the Act of 1919, sect. 6, and in that case only is there to be an analysis of the rent and an inquiry into the amount of profit the rent charged yields to the occupier. Even in this case the section does not alter the definition of "the standard rent," but merely makes past excessive rent already paid recoverable. This provision is restricted to the case of furnished lettings. The present case is not one of those where the tenant claims a right under some form of reservation in his lease to deduct a particular charge from his landlord. Here the claim is, that in order to benefit the tenant the landlord must deduct it from himself.

The only place in the code, other than the provisions as to normal profit in the case of furnished lettings where "the sum periodically paid as rent" is not to be deemed the actual rent, is where under sect. 1 (iii) the landlord has transferred a liability to the tenant, leaving the actual rent untouched. This again is a special provision altering in that case artificially the meaning of "rent," and by it the rent is in consequence of such transfer to be deemed to be "increased" to some amount which the County Court Judge alone can determine; but even this is a matter of increase to a gross rent, not of deduction from it.

Finally, if rent means net rent, and if the maximum rent payable as a progressive rent in 1912 were to become in 1919 the standard rent under sect. 7 of the Act of 1919, it would be a standard rent from which rates not yet in being could not be deducted, and therefore in no sense a net rent. But the standard rent must always be arrived at in the same way. On the construction of the code, I am of opinion that "rent" means the entire reserved rent paid by the tenant, and is not a net rent.

So far as authorities are relied upon, the defendant has referred to *Sheffield Water Commissioners* v. *Bennett* (1). To my mind that case only resembles the present in so far as a similar argument ab inconvenienti to that urged on us by Mr. Henry was there employed. There, however, the argument prevailed, and the Court held that, on the true construction of a series of water and rating Acts, "rent" must be taken as "annual value" or "annual worth." I think that authority only establishes the proposition with which I started, that "rent" may mean something different in every Act. In the present case it cannot mean annual value, for that is separately provided as a distinct test by the Act of 1915. In *Sharp* v. *Chant* (2) both argument and judgments proceeded on the basis that "rent" in the code meant the rent reserved, and the point made here was not raised. It was, however, as Mr. Bartley pointed out, expressly taken and decided in the case of *Westminster and General Properties and Investment Co.* v. *Simmons* (3) before Bray J. Short as the report is, for myself I concur in his judgment. The defendant has failed to establish any distinction satisfactory to my mind between the facts or principle of that case and the present, and I think the learned Judge was right when he summed up the whole case in the words: "The rent remained that provided by the lease." For the foregoing reasons I think that Mr. Justice Pim was correct in point of law in his judgment, and that the present motion should be refused with costs.

Solicitor for the plaintiff: *Samuel Kerr.*

Solicitors for the defendant: *Joynt & Crawford.*

H. J. M'C.

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(1) L. R. 7 Ex. 409. (2) [1917] 1 K. B. 771. (3) 35 T. L. R. 669.

[(3) Since followed by the English Court of Appeal: see *Isaacs* v. *Titlebaum*, [1920] W. N. 29.—ED.]

JOHN BOHAN *v.* HENRY J. B. CLEMENTS AND OTHERS, TRUSTEES OF THE RYNN AND BLACKRIVER DRAINAGE BOARD, AND EDWARD J. COLEMAN, SECRETARY OF THE SAID BOARD, DEFENDANTS (1).

Appeal.
1919.
Nov. 14, 17.

Local Drainage Board—Trustees' failure to perform duties—Negligence—Non-feasance—Injury caused to riparian owner—Drainage (*Ireland*) *Act*, 1842 (5 & 6 *Vict. c.* 89).

The defendants were the duly constituted trustees of drainage works carried out under the Drainage (Ireland) Act, 1842 (5 & 6 Vict. c. 89), the works consisting of the clearing out, and in some places the widening and deepening, of the bed of a natural river which flowed through the plaintiff's lands. The defendants for a number of years had done nothing towards maintaining the works, and had allowed the river to silt up and become choked, with the consequence that the water overflowed upon the plaintiff's lands, and damaged his crops.

Held, by the Court of Appeal (affirming the decision of the King's Bench Division), that the plaintiff was entitled to maintain an action for damages against the defendants, as trustees of the drainage works, for the injury caused to his crops by reason of their neglect.

CASE STATED by Mr. Justice Gordon on the hearing of a civil-bill appeal at the Spring Assizes, 1919, for the county of Leitrim, as follows:—

The civil bill was brought to recover damages "for that the defendants as such trustees negligently omitted to put into a proper state of repair a certain river or drain within their drainage district, and running from Hall's to Carnulla bridge, whereby the plaintiff's lands were flooded and his crops injured."

The County Court Judge gave a decree for £10 damages, with costs and witnesses' expenses, and from this decree the defendants appealed.

The drainage area was fixed and the drainage works were carried out under and in pursuance of 5 & 6 Vict. c. 89, and the defendants were trustees for the maintenance of these drainage works, duly constituted and appointed in pursuance of the Drainage Enactments.

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(1) In the Court of Appeal, before SIR JAMES CAMPBELL C., and RONAN and O'CONNOR L.JJ.

The drainage works consisted of clearing, and in some instances widening and deepening, the bed of a natural river, the Carnulla, which flowed through and past the lands of the plaintiff, and ultimately discharged into the river Shannon. The duty of the defendants was to maintain these works by keeping the river properly cleaned and repaired. No other stream or additional water had been brought into the river.

The plaintiff's case was that up till 1911 the defendants had performed their duty, but that since that date they had done nothing towards maintaining the works, and had allowed the river to silt up and get choked; that he had complained from time to time without effect; and that in September, 1918, owing to this silting up and choking of the river, it overflowed upon his lands, and caused the damage to his crops of which he complained in the action.

His counsel relied on *Bligh* v. *The Rathangan Drainage Board* (1) as deciding that the plaintiff was entitled to maintain his action against the defendants for damages for these injuries.

The defendants admitted that the drainage works at the place in question had not been properly kept and maintained, or the river properly cleaned for some time, but they contended:—

1. That an action for damages for the injuries complained of did not lie against the defendants. That 29 & 30 Vict. c. 49, provided the means by which the defendants could have been obliged to maintain the drainage works if they had neglected their duty; or, if this was insufficient or inapplicable, the plaintiff should have applied to the Court for a mandamus.

2. That this case was distinguishable from *Bligh* v. *The Rathangan Drainage Board* (1), inasmuch as in that case an additional stream had been brought into the river from which the flooding came, whereas in this case no additional water had been brought into the river.

3. That the plaintiff himself had not kept his drains in proper order, and that he had put wire in bushes in the stream, and thereby obstructed the flow of the water.

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(1) [1898] 2 I. R. 205.

Appeal.
1919.

Bohan
v.
Clements.

4. That the flooding complained of was caused by an unusually heavy rainfall, the effect of which proper maintenance would not have provided against.

5. They disputed the amount of damage.

I decided as a fact that the drainage works were not properly maintained, or the river properly cleaned or repaired by the defendants, and although that 3 and 4 might to some extent have contributed to the flooding of the lands, yet the main cause of this flooding was due to the failure of the defendants to properly maintain the drainage works, and to keep the bed of the river cleaned.

Each party asked me to state a case for the opinion of this Court in the event of my not being prepared to decide in his favour.

The question for decision is:—

Upon the facts stated, was the plaintiff entitled to maintain an action for damages against the defendants as such trustees for the injury caused to his crops by reason of their neglect to properly and sufficiently maintain the said drainage works?

If the answer is in the affirmative, the decree on the civil bill to be affirmed, with costs and expenses.

If the answer is in the negative, the decree to be reversed, and the civil bill to be dismissed, with costs and expenses.

The King's Bench Division having answered the above question in the affirmative, the defendants appealed to the Court of Appeal.

Price K.C., and *Henry Webb*, for the appellants:—

If this action is brought under the statute 5 & 6 Vict. c. 89, it is plain that the statute does not create a duty in the trustees to maintain the drainage works. Sect. 120 provides that the trustees are "authorized" to do such works "as they shall think necessary." It is a permissive section: *Simpson* v. *Attorney-General* (1). The argument that the statute gave no right of action is strengthened by sects. 140 and 144, which expressly give a right of action in other special circumstances, and by the provisions of 16 & 17 Vict. c. 130, sects. 41–43, and 29 & 30 Vict. c. 49, the preamble to which, after referring to 5 & 6 Vict. c. 89, and the amending Acts, recites that "it is frequently found that lands improved by such drainage works are allowed to be injuriously affected by reason of the insufficient maintenance of such works; and the trustees of the districts in which such lands are included neglect in many instances to maintain and repair the said works . . . and no efficient remedy in such cases is provided by the said Acts." Even if the statute of 1842 imposed a legal duty upon the trustees, it does not follow that the plaintiffs here have a right of action. The duty, if any, is a duty to the district, and does not give an individual a cause of action: *Glossop* v. *Heston and Isleworth Local Board* (1). The breach of a public statutory duty is not necessarily actionable: *Atkinson* v. *Newcastle Waterworks Co.* (2); *Clegg, Parkinson, & Co.* v. *Earby Gas Co.* (3); *Johnston and Toronto Type Foundry Co.* v. *Consumers' Gas Co. of Toronto* (4). *Bligh* v. *Rathangan Drainage Board* (5) is distinguishable, because there the defendants had invaded the plaintiff's common law rights by altering the natural flow of the water; here the case finds that no additional water was brought down by the drainage operations.

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(1) [1904] A. C. 476.

G. Fetherstonhaugh K.C., and *James Geoghegan*, for the respondent:—

It appears from sect. 120 of 5 & 6 Vict. c. 89 that these works were originally carried out by the Commissioners of Works. The duty of the defendants, under sects. 120 and 121, was to maintain and uphold the works so carried out. They were appointed for this specific purpose, and when, admittedly, they have done nothing for years, and damage results from their negligence, an action for damages lies at common law. Sect. 4 of the 29 & 30 Vict. c. 49 was merely intended to provide a further and more effective remedy, as is apparent from the preamble to the Act itself. Can it be said that in the interval of

(1) 12 Ch. D. 102.
(2) L. R. 2 Ex. D. 441.
(3) [1896] 1 Q. B. 592.
(4) [1898] A. C. 447, at p. 454.
(5) [1898] 2 I. R. 205.

time between the two statutes a party damaged by the negligence of trustees had no remedy? The doctrine of nonfeasance is confined to cases relating to highways. In *M'Clelland* v. *Manchester Corporation* (1) the defendants were held liable for having acted negligently in the performance of their statutory duties with regard to maintaining and lighting a street. Having undertaken to perform the duty, they are bound to exercise proper and reasonable care in its performance: see judgment of Lush J., at p. 129. There has been "a failure in the performance of an absolute statutory duty": *Groves* v. *Lord Wimborne* (2). See also judgment of Kennedy L.J., in *Dawson & Co.* v. *Bingley Urban Council* (3). Once the distinction between misfeasance and nonfeasance is out of the present case, *Bligh* v. *Rathangan Drainage Board* (4) applies. Sir P. O'Brien L.C.J. there said (at p. 212): "If by a reasonable exercise of their powers under the statute they could have prevented the damage complained of, and, by reason of their neglect in putting these powers into operation, the damage arose, they are responsible. In that case they cannot justify under the statute." See also judgment of O'Brien J., at p. 226: *Nicholl* v. *Mulkear Drainage District Board* (5).

Cur. adv. vult.

Nov. 20.

Sir J. Campbell C.:—

In this case the plaintiff was the occupier of lands within a contributory area under the Drainage Code, and he brought an action by civil bill against the trustees of the Drainage Board for damage which he alleged had been occasioned to his lands by reason of the failure of the trustees to maintain the drainage works. The matter came on appeal at the Assizes before Gordon J., who has stated a case for the opinion of the Court, one of the findings of fact being that it was admitted that the drainage works were improperly maintained, or, in other words, that they had not been properly maintained. It has been argued on behalf of the trustees that as they were a public body entrusted with a discretion as to the manner and method in which they

(1) [1912] 1 K. B. 118.
(2) [1898] 2 Q. B. 402, at p. 413.
(3) [1911] 2 K. B. 149.
(4) [1898] 2 I. R. 205.
(5) 6 L. R. Ir. 45.

would discharge their statutory duties, the mere omission to cleanse or scour the drains was not a matter which would render them liable to a civil action; and that, in any view of this drainage code, the trustees were not liable to be impleaded in a Court of law by an individual, inasmuch as in several of the Acts of Parliament constituting the code alternative remedies were provided for an aggrieved party, either by way of appeal to the Commissioners of Public Works, or by having recourse to a Court of summary jurisdiction, and it has been contended accordingly that, looking to the purview of the entire code, the intention and purport of the Legislature was to prevent the trustees from being sued by individual contributories for injuries or wrongs affecting the persons complaining.

As regards the first contention, I think it is plain that although the trustees are given a discretion as to the mode and manner in which they will carry out the duties entrusted to them, they have, nevertheless, under these statutes an obligation to maintain their drainage works, and where, on the admitted facts, they have failed to discharge that duty in any shape or form, as they admit in this case they have failed to do for a considerable number of years, it seems to me that the principles of law relating to the distinction between misfeasance and nonfeasance, omission and commission, have no application. It is not a case of the trustees having made a mistake in the execution of their duty; they have failed to discharge their duty at all, and, in my judgment, where that is so, they are liable to be sued by a single contributory for the damage resulting from that breach of statutory duty.

I only desire to add that I am not to be taken as deciding that if these trustees, in an honest and bona fide exercise of their powers and obligations, had maintained or endeavoured to maintain these works in such a way as to cause injury or damage to some one or more contributories, an action for damages would lie against them. It is possible to conceive of cases where, in an honest endeavour to discharge their statutory obligations, the trustees might cause more or less serious damage to one or more contributories, and in such a case it might be a difficult matter for the aggrieved party to render the trustees liable to an action for damages. These are not the facts in the present case; for the purposes of this case I only decide that the trustees were under a statutory obligation to maintain these works; they admit they have failed to do so; the plaintiff has suffered a certain amount of damage resulting from their failure, and I can see no reason why he should be deprived of his ordinary civil remedy. The decree of the County Court Judge was right, and should be affirmed.

RONAN L.J.:—

I am of the same opinion, and for the same reasons. It was admitted at the hearing that the drainage works had not been properly kept and maintained for a considerable time, and the Judge has found that the main cause of the flooding was due to this failure on the part of the defendants. In these circumstances, the plaintiff has plainly suffered special damage from the defendants' admitted breach of their statutory duty; and, in my judgment, an action for damages at common law is accordingly maintainable.

O'CONNOR L.J.:—

Section 120 of 5 & 6 Vict. c. 89 provides for the appointment of trustees on behalf of the proprietors of a drainage district, and then goes on to say:—"The said trustees are hereby fully authorized to make, alter, support, and maintain, or cause to be made, supported, altered, and maintained all such cuts, drains, banks, sluices, tunnels, bridges, engines, buildings, and other works in and about the land so drained as aforesaid as they shall think necessary for draining and preserving the same." The first question that arises on this section is: Does it impose a duty on the trustees, it being argued on their behalf that, inasmuch as the language of the section is, in its terms, permissive—"authorized" and not "required"—no duty whatever is cast upon the trustees? I am of opinion that this contention is not well founded. To hold otherwise would be to sanction the notion that persons who assume a statutory office can altogether ignore the functions for the performance of which the office was created, and for which they were elected. But, indeed, this matter is put beyond doubt by sect. 144, which speaks of "any river, stream, or watercourse, . . . bank, dam, or sluice which, under the provisions of this Act, the said Commissioners or trustees may take upon them the duty of regulating or maintaining." This section shows that the functions were not merely permissive, but obligatory. The next point raised on behalf of the defendants is that the question of the proper performance of the duties is one entirely for them (having regard to the words I have quoted: "as they shall think necessary for draining and preserving the same"), and that it is not competent for any Court of law to inquire into any alleged neglect on their part. I reserve the right to say, if and when a case arises, whether the bona fide decision of the trustees that a certain work is or is not necessary can be challenged in a Court of law; that is a matter upon which much may be said on behalf of the trustees. But that question does not arise here, for the defendants admit the necessity for maintaining the cut or drain, but deny their liability for not maintaining it. I am of opinion that where they admit this necessity, the performance of the duty is not in their discretion, but is mandatory upon them. The last point raised by the defendants is that, admitting the duty and admitting its breach, no action lies for the breach. This is a statutory duty imposed for the benefit of a class; the statute (for, of course, in construing the statute we must look at its own provisions and not at those contained in a later and supplementary statute) enacts no specific remedy; the principle is clear that in the absence of anything indicating a contrary intention, an action lies for the breach. I can find no contrary intention in this statute. On the other hand, I find, in the same section 144, the clearest indication that the statute contemplated actions against the trustees for breaches of duty to maintain the works, for this section takes care to keep them harmless from certain breaches (of which the present case is not one) unless certain notices of the impending damage have been given and ignored.

For these reasons, I agree in thinking that the decree should be affirmed.

Solicitor for the appellants: *R. A. Corscadden.*

Solicitor for the respondent: *J. A. Kiernan.*

R. ST. J. C.

STEELE *v.* BELFAST CORPORATION.

(1918. No. 6214.)

K. B. Div.
1919.
May 26.

Appeal.
June 18, 20, 30.
Nov. 3.

Negligence—Tramcar—Signal to start car given by passenger—Liability of defendants—Duty of counsel on settlement of questions for jury.

In an action for negligence the evidence for the plaintiff was to the effect that, while a tramcar was at a standstill at a compulsory stopping place, indicated by a red signal-post, the plaintiff proceeded to enter, but, as she had put her foot on the step, a passenger on the platform rang the conductor's starting bell, and the driver put the tram in motion, with the result that the plaintiff was thrown to the ground and sustained serious injuries; that during all this time the conductor was on the top of the car collecting fares; and that during the earlier part of the same journey the bell had been rung by passengers on at least three occasions.

At the trial the defendants' counsel called no evidence, and asked for a direction. The jury found for the plaintiff.

Held, by the King's Bench Division (1), that there was sufficient evidence to sustain the verdict of the jury. *Held* also, that it was not open to the defendants' counsel to rely on any defects in the questions to which he had not drawn the Judge's attention at the trial.

The decision of the King's Bench Division on the main question affirmed by the Court of Appeal (2).

Per Sir J. Campbell C.: Where, at the close of the plaintiff's case, counsel for the defendant asks for a direction which is refused, and does not go into evidence, he has no responsibility for the form or sufficiency of the questions submitted to the jury, and is in no way estopped from questioning or criticizing them in any subsequent proceedings. The duty of Judge and counsel in relation to the framing of questions for the jury stated.

New Trial Motion.

This was an action brought against the defendants to recover damages from the Belfast Corporation as owners of the tramway system for injuries sustained by the plaintiff, Margaret Jane Steele, while in the act of mounting a tramcar of the defendants at Mountpottinger corner, in the City of Belfast.

The tramway system of Belfast is owned and worked by the corporation as a municipal undertaking; the places for the cars to stop for the purpose of allowing members of the public to enter or alight are indicated by posts, the shorter, described as red stops, being compulsory stopping places for cars which have not already their full complement of passengers, and the others indicating particular places on the route at which the car will stop by request of any person desiring to enter or leave it.

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(1) In the King's Bench Division, before Molony C.J., and Gibson and Gordon JJ.

(2) Before Sir James Campbell C., and Ronan and O'Connor L.JJ.

Upon the occasion in question, Saturday, September 28th, 1918, a car had started for the city from the suburbs at an hour not definitely fixed, but apparently at or about 10.30 p.m. This car reached Cromac Street, where there is a red stop, and the conductor being apparently engaged at the moment collecting fares inside the car, a passenger re-started the car, giving the appropriate signal to the driver by pulling the conductor's bell from the rear platform of the car. The same thing happened subsequently at Short Strand, another red stop, the conductor on this occasion being engaged in collecting fares from passengers on the top of the car. Again at Woodstock, a request stop, the car pulled up, whether at the request of some one entering or leaving the car does not appear, and it was re-started by a passenger, there being no evidence as to the whereabouts of the conductor on this occasion. Upon its further journey it reached Mountpottinger, a red stop, and here there were five intending passengers awaiting its arrival. At this time there were three passengers standing on the rear platform, and as one of the five persons, Caroline Legg, attempted to enter the car, she had to give way to a passenger who was leaving it. Another of the five, the plaintiff, Mrs. Steele, then proceeded to enter the car, holding the upright bar in her hand; but just as she had placed her feet upon the step below the platform, one of the three passengers upon it rang the conductor's starting-bell, and the driver put the car in motion, with the result that Mrs. Steele lost her balance and was thrown from the car, being dragged along the ground for some distance, notwithstanding the efforts of her husband and others to hold her up. As a consequence she sustained serious injuries, the nature and extent of which are irrelevant to the question to be decided. It was proved that the conductor at the time the car stopped and this accident happened was on the top of the car personally collecting the fares.

The questions put to the jury and the answers thereto were as follows: 1. Was the conductor negligent in not being himself on the platform at a red stop? Yes. 2. Was the conductor negligent in permitting the bell to be under the control of a passenger on the platform? Yes. 3. Was the conductor negligent in not anticipating that a passenger on the platform might precipitately ring the bell? Yes. 4. Was the driver of the car negligent in starting the tram notwithstanding that the bell had rung? No. 5. Were the defendants negligent in not taking reasonable precautions to provide a safe access to a tramcar to a person invited to enter it as a passenger, and, if so, what reasonable precaution did they omit? Yes, in so far that the car had not an efficient conductor. 6. If so, was it by reason of such negligence that the accident occurred? Yes. 7. Were the injuries caused by the negligence of the plaintiff? No. 8. Damages? £550. After the jury had returned the foregoing verdict, the learned Judge put to them four supplementary questions, which, with the answers, were: 1. Did they on this occasion provide a reasonably safe access? No. 2. Did they provide a reasonably safe access? No. 3. Did they invite the plaintiff to enter? Yes. 4. Was it by reason of their not providing such access that the plaintiff suffered the injuries complained of? Yes.

The learned Judge (Dodd J.) gave judgment for the plaintiff for £550 and costs.

Hanna K.C. and *T. W. Brown K.C.* (with them *T. Harrison*):—

The injury was caused by the unauthorized act of a third party, and the defendants therefore cannot be made liable: *Beard* v. *London General Omnibus Co.* (1). The fact that the conductor was on the top of the tram collecting fares is not evidence of negligence; and, even it were, it was not the proximate cause of the accident. The damage is too remote.

M'Gonigal K.C. and *Andrews K.C.* (with them *Lowry*):—

The absence of the conductor on the top of the tram provided the opportunity for the third party to do the wrongful acts. The conductor might reasonably have anticipated the result which in fact happened. It was his duty to be present on the platform to stop and start the tramcar: *Sullivan* v. *Creed* (2); *Engelhart* v. *Farrant* (3).

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(1) [1900] 2 Q. B. 530. (2) [1904] 2 I. R. 317. (3) [1897] 1 Q. B. 240.

T. W. Brown K.C., in reply :—

The duties of the conductor are not confined to the platform. He has a duty to perform on the top of the tram. To go on top is therefore no evidence of negligence.

MOLONY C.J. :—

This action has been brought against the defendants to recover damages for injuries sustained by the plaintiff while in the act of mounting a tramcar of the defendants at Mountpottinger corner, in the City of Belfast. In Belfast, as in Dublin, there are certain places where the tram stops by request, and certain other places where all trams stop, and which are denoted by a red sign on the footway, and are called "red stops." Mountpottinger corner is one of the places at which every tram stops.

On the night of the 28th of September, at a quarter to 11 o'clock, the plaintiff and her husband were standing at Mountpottinger corner waiting for the arrival of the tram. It came up and stopped in the usual manner. When the car stopped there were some three or four passengers on the platform, and there were five persons waiting to get on the car, which was not crowded. One passenger had got off, and the plaintiff had mounted the step of the tram; but she had only one foot on the step when one of the persons on the platform rang the bell, and the tram went off, with the result that, although the plaintiff's husband tried to hold her up, he failed to do so, and she was thrown to the ground and sustained serious injuries. All this time the conductor was on the top of the tram, and he did not come down until after the accident had occurred and another passenger had pulled the bell to stop the car, or, as it was put by Caroline Legg, "he came from the top after all was over."

In this state of facts it is sought to make the defendants liable on the ground that the conductor was negligent in not being on the platform at the red stop, where it was reasonable to expect that passengers would be getting on and off, and where it was his admitted duty to start the car. On the other hand, it is alleged that the accident was entirely caused by the independent action of a third person, for which the defendants can in no way be held liable.

The principle governing a case of this character was exhaustively considered by this Court and by the Court of Appeal in the case of *Sullivan* v. *Creed* (1); and the effect of all the decisions is thus summed up by FitzGibbon L.J. at page 339: "Where an injury has been suffered which would not have happened but for the action of more than one person, no one of the several persons whose action led up to the injury will be answerable in damages for it unless his action caused it, and it should be held to have caused it if a man of ordinary prudence, having regard to all the circumstances, ought to have anticipated an injury as a not improbable—'likely' is too strong—consequence of his action. If so, he is responsible, notwithstanding that the injury would not have happened but for the independent act of a third party."

In considering the conduct of the conductor two questions arise—1, whether he was negligent, and 2, whether his negligence was the effective cause of the damage to the plaintiff: see *Engelhart* v. *Farrant & Co.* (2).

In order to show that the conductor was negligent on the occasion in not coming down, evidence was given by Mr. James Martin, notwithstanding Mr. Hanna's objection, that at three stops before the car came to Mountpottinger the conductor was not on the platform. At Cromac Street red stop he was said to be inside collecting fares, that some one else rang the bell, and that the conductor did not either ring it himself or prevent it being rung; at Short Strand Street red stop the conductor was upstairs, and some one again started the tram; at Woodstock Road junction, which is a stopping place by request, a passenger again gave the signal to start; and the next red stop was Mountpottinger corner, where the accident happened.

In my opinion, this evidence was properly admitted, as it tended to show that the conductor was not very mindful of his duty in starting the car after it had arrived at a red stop.

It was admitted by the defendants that it was the duty of the conductor to start the car, and that nobody else had any right to do so; but it was strenuously contended on their behalf that there was no obligation upon the conductor to be upon the platform at the time of the arrival of the car at a red stop, and that all that he was required to do was to come down and start the car within a reasonable time. This, of course, was a question of fact for the jury, but it does not seem to me unreasonable to expect that the conductor should be on the platform at a place where the car was bound to stop, and where, in the ordinary course, there would be passengers both entering and leaving the car, and where, in the absence of the conductor, it was not improbable that some passenger would start the car.

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(1) [1904] 2 I. R. 317.

(2) [1897] 1 Q. B. 240.

At the close of the case Mr. Hanna asked for a direction on the ground that the proximate cause of the accident was the unauthorized act of a third person, and that there was no negligence in the conductor being on the top collecting fares, and that even assuming it to be negligence, it was not the negligence which caused the accident.

The learned Judge declined to direct, and proceeded to settle questions for the jury. It appears, however, from the Judge's note that when he had settled the questions Mr. Hanna made two objections, which were acceded to by the Judge, and that the questions were then submitted to the jury without further objection.

I think that the questions fairly tried the issues between the parties, but in any case I am clearly of opinion that it is not now open to Mr. Hanna to rely on any defect in the questions to which he did not draw the attention of the Judge at the trial, where the defect could have been at once remedied: *M'Dougall* v. *Knight* (1); *Seaton* v. *Burnand* (2); *Banbury* v. *Bank of Montreal* (3).

Having carefully considered the arguments of Mr. Hanna and Mr. Brown, I am of opinion that there was sufficient evidence to sustain the verdict of the jury, and that the defendant's application should be refused with costs.

May 27.

GIBSON J.:—

The regulations (if any) of the tram service prescribing the duties of conductors are not before us. We have to deal with their functions with such knowledge as jurors, judges, and the travelling community possess. The conductor signals the driver to start by a bell, which is obviously intended to be under his exclusive control. If he negligently rings when a passenger is entering and the latter is thrown by the unexpected motion, liability would be clear. The result would be the same if he permitted a passenger to do the same negligent act. His duty being personally to superintend the starting of the car under his control, if he was aware that passengers were in the habit of ringing at fixed stopping places, he ought to exercise reasonable care to stop such a practice. The obvious method would be to stand on the platform before the car should resume its course. He should adjust the performance of his functions in such a way that the safety of the travelling public should not be prejudiced by his absence collecting fares or otherwise. There is no evidence of any such dangerous practice generally, but on this very journey on several occasions the car was set in motion by a passenger without remonstrance or attempt at prevention; the act was dangerous; the conductor ought to have known that it might be repeated; he tolerated or suffered, if he did not permit, the passenger's conduct: qui non prohibet quod prohibere potest assentire videtur; and whatever view may be taken of his inaction, he should have been present on the platform at a reasonable time before the car should start again on its journey from the regular station. The conductor was not examined to explain what he was doing to account for his absence, or how long the car had come to a standstill, or how long he was away from the platform. In my opinion the defendants, who gave no evidence, were not entitled to a direction. There was a jury question whether the conductor, knowing what had been done shortly before, should not have taken precautions to avoid the danger; security could have been ensured by his coming on the platform; there is no evidence that his duty elsewhere prevented him from so doing.

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(1) 14 A. C. 194.

(2) [1900] A. C. 135.

(3) [1918] A. C. 626.

There was no objection to my brother Dodd's charge or to the questions, the effect of which he doubtless explained. The latter have been criticized by Mr. Hanna. I cannot agree with him that, when counsel asks for a direction on untenable grounds and calls no evidence, he is relieved from all responsibility as to the frame of the questions proposed to try the issue. Where there are issues to be tried by a jury, counsel on both sides are under a duty to assist the Judge as to the questions proposed to be put, and it would be a trap to the Judge and unfair to the successful litigant if a party in anticipation of defeat were to reserve objections in his own breast, and afterwards on such unmentioned objections seek to upset an honest verdict, the result of the fair course of the trial. Such procedure would be quite opposed to the spirit of sect. 48 of our Judicature Act. I think that the questions tried the issue which determined liability. The cause of action was established if the jury found, 1, that the ringing of the bell by a passenger in the conductor's absence was a risk that the conductor could and ought to have foreseen and guarded against by being on the platform; 2, that the conductor's unexplained absence was negligent; 3, that the plaintiff was thereby injured. Whatever was the motive of the passenger, whether impatience at the conductor's non-appearance, or hurry to reach his destination or otherwise, his act in ringing was attributable to the conductor being away from his post at the red signal-post station. The case is not at all the same as if a passenger, at a request stopping place, had unexpectedly, when the conductor was on top, given a bell-signal to stop and another person entering had been then thrown by the car being restarted by some passenger.

Another view has also suggested itself to me, founded on the judgments of Lord Justice FitzGibbon in *Byrne* v. *Londonderry Tram Co.* (1), at p. 474, and of Lord Justice Holmes in the same case, at p. 482. What were the duties of the conductor as defined by the regulations of the defendants? We do not know; we must estimate what was his apparent sphere of duty to some extent by every-day experience. At an invariable stopping place, the conductor's apparent post of duty would be on his platform, where he can exercise supervision and control over the admission of passengers, some of whom if drunken or disorderly, and others if the car was already full, it might be necessary to prevent entering. He is also to see to the safe departure of the occupants of his car. Prima facie at such stopping place the conductor's platform is where according to experience of jurors and others he ought to be found. There is no direct evidence that on this occasion he was engaged in collecting fares; if he was, that fiscal duty should have been postponed to his paramount obligation towards passengers coming in and going out.

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(1) [1902] 2 I. R. 457.

The proposition of Mr. Hanna that as matter of law the conductor's duty on the platform only began when the car was about to start, and that the jury should have been so directed, is manifestly unsustainable. How long might he be away? When was the car to be set in motion? This latter aspect of the case was present to the mind of my brother Dodd; but as it has not been argued, I do not base my decision upon it, though I am far from saying that the verdict might not be supported on this ground.

Gordon J.:—I concur.

H. H.

June 18, 20, 30.
Nov. 3.

The defendants appealed to the Court of Appeal (1).

Hanna K.C., *T. W. Brown K.C.* (with them *T. Harrison*), for the appellants:—

We submit that there was no evidence of negligence on the part of the defendants or their servants, and that the effective cause of the accident was the unauthorized interference with the bell by an intervening and independent third party. Authorities cited: *Byrne* v. *Londonderry Tramway Co.* (2); *Martin* v. *Dublin United Tramways Co.* (3); *Roscoe* v. *Dublin United Tramways Co.* (4); *Ricketts* v. *Tilling* (5); *Wheeler* v. *Morris* (6); *Ruoff* v. *Long* (7); *Gwilliam* v. *Twist* (8); *Pickering* v. *Corporation of Belfast* (9).

There was no obligation on the conductor to be on the platform when the car arrived at a compulsory stopping place, as it was the duty of the driver to stop there. At such stopping places the duty of the conductor only began when the car was about to start; and as nobody had a right to ring the starting bell except the conductor, he could not have anticipated that anybody would have pulled the bell. The conductor should be on the platform at a stop-by-request post to receive the requests of passengers: *M'Sherry* v. *Glasgow Corporation* (1); *Watt* v. *Corporation of Glasgow* (2). In the latter case the Lord Ordinary said: "There is no reason why she [the conductress] should not be upon the roof of the car doing her work there when the car approaches and leaves a compulsory stopping place. The duty of passengers intending to leave the car at a compulsory stopping place is to keep their seats until the car stops, and then proceed to leave it; and the conductress if on the roof is in a position by looking over the sides of the car to see whether passengers have left it, and when people desire to board the car if all have entered it. All this being done, she then, in ordinary practice—we all know this is done—gives the signal to the driver by ringing the bell or blowing the whistle. But then a stop-if-required station seems to me to be in an entirely different position. The contract of carriage with reference to the stop-if-required station between the corporation and the passenger is this: that 'if required' the car will be stopped at that station either to allow a member of the public to get on it, or to allow a passenger to leave it."

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(1) Before Sir James Campbell C., and Ronan and O'Connor L.JJ.

(2) [1902] 2 I. R. 457, 469.
(3) [1909] 2 I. R. 13.
(4) [1909] 2 I. R. 15n.
(5) [1915] 1 K. B. 644.
(6) 84 L. J. K. B. 269, 1435.
(7) [1916] 1 K. B. 148.
(8) [1895] 2 K. B. 84.
(9) [1911] 2 I. R. 224.

In this case some of the findings were inconsistent; there was no evidence to support others, and no case was made at the trial of a negligent system.

M'Gonigal K.C., *Andrews K.C.* (with them *W. Lowry*), for the respondent:—

On the facts of this particular case the plaintiff is entitled to hold the verdict. Part of the duty of the conductor of the car was to give the signal to the driver to start the car by ringing the bell. He should have prevented any passenger or unauthorized person from interfering with the bell. He had notice that at three previous stops a passenger had rung the bell. It was negligence on his part not to come upon the platform at the

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(1) 54 S. L. R. 178.

(2) 56 S. L. R. 225.

Appeal.
1919.
Steele
v.
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stop at which the accident happened, having regard to the interference with his bell at the previous stops. It was a compulsory stop, and he knew the car must stop there. His neglect of duty gave the opportunity or occasion to the passenger to do the act which resulted in damage to the plaintiff. That entitles the plaintiff to recover: *Engelhart* v. *Farrant* (1); *Sullivan* v. *Creed* (2). The conductor should have anticipated the danger of a passenger ringing the bell in a negligent manner. The questions involved were for the jury, and they have found in favour of the plaintiff. There was evidence to go to the jury sufficient to support their findings, which should not be set aside.

Hanna K.C., in reply:—

Engelhart v. *Farrant* (1) is distinguishable on the ground that the person in charge of the horse and car when the accident in that case occurred was a servant of the defendants.

Nov. 3.

Sir James Campbell C.:—

The facts in this difficult and interesting case are comparatively few and simple, and, owing to the action of the defendants in giving no evidence at the time, must be taken as admitted.

[His Lordship then stated the facts as set out at p. 125, ante, and proceeded.]

At the close of the plaintiff's case Serjeant Hanna, on behalf of the defendants, asked for a direction upon the ground that there was no evidence of any negligence contributing to the accident on the part of the defendants or their servants, and that in any event the effective cause of the accident was the unauthorized interference with the bell by a passenger. The presiding Judge declined to direct, and no evidence being produced on behalf of the defendants, the jury, after hearing the speeches of the counsel and the Judge's charge, found a verdict for the plaintiff for substantial damages. Before I deal with the material findings of the jury, I should mention that after they had answered the original questions submitted to them, the Judge left them some supplementary questions intended to raise the issue as

(1) [1897] 1 Q. B. 240.

(2) [1904] 2 I. R. 317.

to whether the system was defective in so far as it failed to provide a safe access for intending passengers, and the promptitude with which the jury answered these questions in favour of the plaintiff, together with the somewhat laconic dialogue that passed between them and the Judge as to the age and experience of the conductor, has created in my mind some misgiving as to the course of the trial. I think it was the duty of the Judge to warn the jury that they were not at liberty to draw any unfavourable inference as to the competence, age, or efficiency of the conductor merely from the fact that he had not been examined on behalf of the defendants, but only from the matters in evidence before them.

Further, the issue as to failure to provide a safe access was not raised on behalf of the plaintiff either by the pleadings or particulars in the action, and, as her counsel informed us, was not contended for at the trial, nor was it argued before us. Speaking for myself, I am of opinion there was no evidence to justify the findings of the jury on this particular issue, and, if it was considered material, counsel for the defendants should have had the opportunity of addressing the jury upon it. I have, however, come to the conclusion that this element in the case may be discarded from our consideration owing to the attitude taken up by counsel for the plaintiff both here and in the King's Bench Division, as they have expressly, and I think wisely, limited their case in both Courts to two propositions. The first of these is that there was an unqualified obligation upon the conductor to be present on the platform upon all occasions when the car stopped for the purpose of enabling a passenger to enter or leave the car. This proposition was not very strenuously argued by counsel for the plaintiff, and indeed they were not always agreed among themselves as to its universal application to compulsory stops; while as to stoppage by request, their final position, as I understood it, was that it did not apply at all. Obviously, in view of the short intervals between the stopping places, whether as a matter of course or by request, such an unqualified obligation would involve the presence of two conductors on every car, and counsel for the plaintiff expressly repudiated any such suggestion. I do not think that the judgments in the King's Bench Division, when fairly construed, give

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any support to the existence of such an unqualified obligation, and in my opinion it is untenable. For example, it has been decided in a very recent case in the Scotch Courts, to which we were referred, that it is not negligence on the part of the conductor to signal in daylight from the top of the car to the driver to restart the car, nor if the conductor is engaged in the collection of fares on the top of or inside the car at the moment of stopping is he, in my opinion, thereby guilty of neglect of duty, provided he descends or comes out to the platform without unreasonable or unnecessary delay. So long as the car is at a standstill it is practically safe to all intents and purposes for every person desiring to enter or leave it, and no evidence was given at the trial of this action that under ordinary conditions the conductor should have anticipated unauthorized interference with the starting bell.

The cases in reference to fire-arms and dangerous or explosive substances, of which *Sullivan* v. *Creed* (1) is a leading example, are of a wholly different and special character, depending upon the notorious experience of everybody that want of extreme care and caution in the handling and custody of such things has frequently led to injury and disaster to members of the public. In this connexion I may say that I have been unable to find any case, nor was any referred to in argument, in which the Courts had to deal with a claim for compensation in respect of injuries received as the result of the unauthorized use by a passenger of the starting bell of a tramway car, although it is within the experience of all of us, if we are at liberty to use it, that such acts of interference are not infrequent.

Counsel for the plaintiff have, however, relied with greater confidence and conviction upon a second proposition, namely, that the special incidents which had already occurred on this particular journey were, or ought to have been, present to the mind of this particular conductor, and consequently he should, in the exercise of ordinary prudence and caution, have anticipated that some accident might not unlikely result from their repetition, and taken the obvious precaution of being present on the platform to prevent it. This is a well-established principle in cases where

(1) [1904] 2 I. R. 317.

it is sought to link up the antecedent negligence of a defendant or his servant with the independent act of a third party, where that act has been the immediate cause of the accident. FitzGibbon L.J., in his judgment in *Sullivan* v. *Creed* (1), page 341, points out that this principle is mitigated in cases where the defendant has the right to assume that the thing was not so dangerous, or was not in a condition so dangerous, that leaving it where or as he found it exposed him or others to any special and undisclosed risk of injury. But, as Palles C.B. states in his singularly lucid judgment in the same case, at pp. 330–331, the question as to what was the reasonable duty in the circumstances of the defendant or his servant must be a question for the jury, unless and except the Judge should determine that the circumstances were not such as would justify a jury in reasonably arriving at a conclusion favourable to the party upon whom the onus lay. Applying this test to the facts in the present case, I have come to the conclusion that the case could not be withdrawn from the jury. I think it was reasonably open to them to find, as they have done, that in the circumstances the conductor should have anticipated that the bell might be incautiously or prematurely rung by a passenger, that he was therefore negligent in his omission to be upon the platform at this particular stage, and that this negligence was the effective cause of the accident.

During the earlier portion of this same journey the bell, upon the evidence, had been rung and the car re-started upon at least three occasions by the unauthorized act of a passenger. It is true that there was no evidence that upon any of these occasions there was anything negligent or incautious in the ringing, or that any danger was thereby caused or threatened to the passengers or other persons; and it was therefore, in my opinion, open to the jury, had they taken the view, to find, in the language of FitzGibbon L.J., that the conductor was right in assuming that no danger was likely to result from the act being repeated; but I think they were equally entitled to find to the contrary, as they did. These antecedent events were, unquestionably, evidence, as the question in all cases of this kind must depend upon the

(1) [1904] 2 I. R. 317.

circumstances which at the time were or ought to have been present to the mind of the party who had a duty in respect of them. It was late and on a Saturday night, when obvious considerations upon which I need not enlarge might suggest impatience or recklessness on the part of a passenger, which the conductor from his place on the top of the car would be unable to guard against; and it was not therefore, in my opinion, perverse upon the part of a jury to find that in view of the previous unauthorized use of the bell he should have taken special precautions to obviate further interference of the kind.

During the course of the argument it occurred to my mind that the act of the passenger whose ringing of the bell was the immediate cause of the accident, at a moment when he must have seen that the plaintiff and the other persons were in the act of ascending the car, was so wanton and deliberate as to constitute a conscious act of deliberate volition on his part within the authority of *Sullivan* v. *Creed* (1), as explained in the judgment of Holmes L.J., and in the case of *Dominion Natural Gas Co., Ltd.*, v. *Collins & Perkins* (2); but the onus of proof as to this lay, I think, on the defendants, and they did not ask that any issue should be left to the jury upon it.

Before I part from this case I feel bound, in fairness to and for the protection of counsel, to express my unequivocal dissent from the proposition which found favour with Molony C.J. and Gibson J. in the Court below, to the effect that Serjeant Hanna was not at liberty to criticize or question before them the sufficiency or frame of the questions that were submitted to the jury, by reason of his omission to do so at the trial. In every case the duty of framing the questions that are appropriate to decide the issues raised by the pleadings rests primarily upon the Judge at the trial; but where it is admitted that the case is one proper to be submitted to the jury the Judge is entitled, if he so desires, to invoke the assistance of counsel on both sides in framing the questions, and where this is given, or possibly by the acquiescence of silence, or where the Judge, as he frequently does, offers to submit any further or other questions that may be asked for on either side, the Court will not in the absence of special

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(1) [1904] 2 I. R. 317.

(2) [1909] A. C. 640.

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circumstances entertain, upon a new trial motion, any objection to them on the ground of defect in form or omission. But the position is wholly different when, as in the present case, counsel takes the position that no question should be submitted at all, and that he is entitled to a direction by the Judge in his favour on the case as it stands, and elects to peril the whole case upon it by calling no evidence. In such a case the particular counsel has no responsibility for the form or sufficiency of the questions, and is in no way estopped from questioning or criticizing them in any subsequent proceedings.

RONAN L.J.:—

In this case I was much impressed by the arguments of defendants' counsel, and, if I had had to give judgment at the close of the case, I think I would have decided in their favour; but having subsequently considered and re-considered the case, I have, for substantially the same reasons as those given by the Lord Chancellor and by the Judges in the Court below, come to the conclusion that we ought not to disturb the unanimous judgment of the Court below.

O'CONNOR L.J.:—

This is an action brought by a Mrs. Margaret Jane Steele against the Lord Mayor, Aldermen, and citizens of Belfast to recover damages for personal injuries sustained by the plaintiff owing to the negligence of the defendants as owners of the tram system of the City of Belfast. The facts of the case are not in controversy. At about a quarter to eleven on the night of Saturday, the 28th of September, the plaintiff was standing at a "red stop" at Cromac Square, intending to board a tram outward bound from the city. The tram approached, came to a standstill, and the plaintiff proceeded to get on board. She put her foot on the step of the car, at the same time catching hold of the central upright bar of the car. As she did so, a passenger, who, with several others, was standing on the platform (although there was plenty of room inside the car) rang the bell; the car moved on; the lady was dragged along and was somewhat severely injured. The conductor was at the time on the top of the car collecting fares. There was some evidence that at other "red stops" on the same outward journey, and near the place of the plaintiff's accident, the conductor was not at his post when the car stopped, and the bell, the signal to re-start, was given on these occasions (numbering four in all) by a passenger. A special jury of the City of Belfast found in favour of the plaintiff. The King's Bench Division have sustained the verdict, and from that decision this appeal is taken.

At the trial no evidence was given of certain matters which everybody in Court knew, such as the structure of the trams and the practice observed as to stopping and starting the trams. The defendants offered no evidence at all, nor were their rules put in evidence by either side. We were told on the appeal that, with immaterial exceptions, the Belfast tram system and its practice are similar to the Dublin tram system and its practice. Accordingly, we know that there are compulsory or customary stopping places at convenient intervals, indicated by a red pole; that all cars stop at such places; that there are other stopping places, indicated by a white pole, at which cars stop only upon request; that it is the conductor's business, and nobody else's, to touch the bell; that it is an irregularity for a passenger to touch the bell, at any rate for the purpose of starting the car, for thereby he takes control of the car in what is or may be a dangerous operation, namely, the starting of the car; that the bell is on the platform, where anybody who is so minded can ring it, unless prevented by the conductor; that passengers are not supposed to be on the platform, at any rate when there is room inside; that the tram is generally managed by a driver and one conductor; if the practice as to conductors is precisely the same as in Dublin—as to which I am not sure—there may be, in case of a very crowded tram, a conductor and an assistant conductor, one to see after the bell and the other to collect the fares; that the driver cannot from his position see if the car is ready to start, and he takes his directions to start from the bell, and the bell alone.

It will thus be seen that a Belfast tram is, from the time it starts to the time it gets to its destination, under the exclusive control of the defendants' servants. It will also be seen that the system of control is subject to certain risks which it is in the power of the defendants' servants to avoid. The obvious risk, of course, is in the method of communication adopted for the purpose of directing the driver to start the car. The bell is placed so that any person can reach it from the platform; and tramcars are just like other conveyances—they convey people some of whom by habit are reckless and inconsiderate for the safety of others; some of whom, if not so by habit, may be so on an occasion, owing to alcoholic indulgence or otherwise.

What duty in these circumstances is cast on the tram proprietors? At the least a duty to take reasonable care that the bell shall not be touched by the passengers, but shall be manipulated by the conductor alone. If the performance of such duty involves a slower journey, then, in my opinion, the journey must be slower; or if it requires two conductors, then there must be two. How was the duty performed on the night in question? It must not be left out of consideration that this was a 10.45 p.m. homeward-bound tram in a big city. It was fairly full. The passengers were, to the knowledge of the conductor, tinkering with the bell from time to time, without any apparent protest on his part or effort to stop them. He allowed, again without protest, the platform to be occupied by several people in easy and frequent touch with the bell. He himself was doing other business when, prima facie, at any rate, he should have been at his post. He is not called to explain why he was not there, or to explain any of the unusual and irregular matters I have referred to. A jury who are themselves part owners of the concern thought this was negligence. I think so too, and up to the present moment I cannot see that the cases cited to us on the question of delegation by a servant of his duty have anything whatever to say to this case.

I am of opinion that the appeal should be dismissed.

Solicitor for the appellants: *F. Kerr.*
Solicitor for the respondent: *T. E. Alexander.*

C. L.

NOBLETT *v.* LEITRIM COUNTY COUNCIL (1).

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Jan. 31.
Feb. 11.

Local Government — Malicious injury — Damage to plough — Machine or engine — Compensation — Consequential damage — Grand Jury (Ireland) Act, 1836 (6 *&* 7 *Wm.* 4, *c.* 116), *sect.* 135; *Local Government (Ireland) Act*, 1898 (61 *&* 62 *Vict. c.* 37), *sect.* 5, *sub-s.* 1.

Malicious damage to the extent of £2 was done to an ordinary agricultural plough, the property of the applicant, who also suffered monetary loss amounting to £3 5*s.* by being deprived of the use of the plough, which could not be repaired for a considerable time.

Held, by the Court of Appeal, 1, that the plough was a "machine or engine . . . used . . . for ploughing" within sect. 15 of the Malicious Damage Act, 1861, and accordingly that, as the damage to the plough was a crime punishable on indictment under that Act, the applicant was entitled to compensation under sect. 135 of the Grand Jury (Ireland) Act, 1836, as amended by sect. 1 of the Local Government (Ireland) Act, 1898; and 2, that the amount of compensation was not necessarily limited to the amount of actual damage done to the plough, but might include the resulting damage which was the natural consequence of the malicious act.

This was a case stated by Ronan L.J. at the Summer Assizes, 1918, for the County of Leitrim, as follows: The applicant, Joseph Noblett, had obtained from the County Court Judge a decree for £5 5*s.* for malicious injury to a plough, the applicant's property. From this decision the County Council appealed. The following facts were proved or admitted: A plough, the property of the applicant, was maliciously damaged on the night of the 4th March, 1918. The applicant's claim to recover compensation was based on sect. 135 of the Grand Jury (Ireland) Act, 1836, as extended by sect. 5, sub-s. 1, of the Local Government (Ireland) Act, 1898. There was no evidence from which any inference could be drawn that the damage was done by more than one person, and accordingly the applicant's claim could not be based on section 1 of the Malicious Injuries (Ireland) Act, 1853. By reason of the injuries to the plough, which could not be repaired for some considerable time, the applicant suffered a monetary loss over and above the cost of repairing the plough. It is admitted that £2 may be taken as the cost of repair of the plough, and that £3 5*s.* may be taken as the amount of consequential damages sustained by the applicant by reason of his being deprived of the use of the plough pending its repair. The questions for the Court are: 1, Is the applicant entitled under sect. 135 of the Grand Jury (Ireland) Act, 1836, to damages of a consequential nature over and above the actual loss occasioned by restoration? 2. Is a plough a "machine" or "engine" within the meaning of the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 15? If the answer to the first question is in the negative, and the answer to the second question is also in the negative, the decree is to be reversed, and the application dismissed with costs in the County Court and on appeal. If the answer to the first question is in the negative, and the answer to the second question is in the affirmative, the amount of the decree is to be reduced to £2, with costs in the County Court, each party to abide his own costs on appeal.

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(1) In the Court of Appeal, before Sir James Campbell C., and Ronan and O'Connor L.JJ.

Leonard K.C., and *A. H. Webb*, for the respondents:—

This case cannot be brought within sect. 135 of the Grand Jury (Ireland) Act, 1836, as amended by sect. 5, sub-s. 1, of the Local Government (Ireland) Act, 1898, as the injury done to the plough in question was not "a crime punishable on indictment under the Malicious Damage Act, 1861." Sect. 15 of the latter Act does not apply, as this was an ordinary plough, which does not come within the definition of "any machine or engine . . . used or intended to be used for . . . ploughing." See judgment of Johnson J. in *Rose* v. *Carlow County Council* (1), in which the learned Judge refused to follow *Reg.* v. *Gray* (2). Consequently, as the injury was not "to an amount exceeding £5" (sect. 51 of the Malicious Damage Act, 1861), the applicant is not entitled to compensation. It is clear that in no case can consequential damages be included in estimating the injury under sect. 51: *Reg.* v. *Whiteman* (3). We further contend that if the applicant is entitled to compensation, the amount is limited to £2, representing the actual damage to the plough. In *Brackley*

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(1) 34 I. L. T. R. 116. (2) 10 Jur. N. S. 160. (3) 6 Cox, 370.

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Co-operative Society v. *Tyrone County Council* (1) Holmes L.J. authoritatively laid it down that during the sixty or seventy years in which the Grand Jury Act had been in operation there was no case where damages were awarded of a consequential nature. We admit that this conflicts with an unreported circuit decision of Lord O'Brien C.J. in *Duffy* v. *Mayo County Council* (cited in Vanston's "Local Government," vol. ii, p. 1235), and a further unreported circuit decision of Molony C.J. in *Lord Ashtown* v. *King's County County Council.* It was never intended by the Legislature that the ratepayers should be placed in the position of either insurers or trespassers, so as to be liable for consequential damages.

T. J. Smyth, for the applicant :—

A plough is, if not a machine, an "engine . . . for ploughing" within sect. 15 of the Malicious Damage Act, 1861 : *Reg.* v. *Gray* (2), a decision which should be followed in preference to the circuit decision of Johnson J. in *Rose* v. *Carlow County Council* (3). The applicant is therefore entitled to compensation, although the damage to the plough is limited to £2. Under sect. 135 of the Grand Jury (Ireland) Act, 1836, the decree is to be for such sum or sums of money "as the person or persons so injured ought to receive for such injury or damage." This must include consequential damages naturally flowing from the wrongful act.

In *Ballymagauran Co-operative Agricultural and Dairy Society* v. *County Councils of Cavan and Leitrim* (4) counsel for the County Councils contended that while before the Grand Jury Act the ratepayers were in the position of trespassers, and compensation was not limited to actual loss, it was otherwise under the modern procedure ; but this distinction was rejected by the Court, and the true principle of liability is shown by the decision of Palles C.B. (pp. 100 and 101), namely, that the hundred barony or county "is placed in the stead of the wrong-doer, and bound to answer for his default." The old liability of the hundred under 1 Geo. 1, c. 5, sect. 6, was to "reimburse the party injured": *Witham* v. *Hill* (5) ; *Mason* v. *Sainsbury* (6).

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(1) 1 N. I. J. 146.
(2) 10 Jur. N. S. 160.
(3) 34 I. L. T. R. 116.
(4) [1915] 2 I. R. 85.
(5) 2 Wils. 91.
(6) 3 Doug. 61.

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Leonard K.C., in reply.

The following cases were also cited: *Collard* v. *South-Eastern Railway Co.* (1); *English* v. *County Council of Kerry* (2); *Laffan* v. *Cashel Urban District Council* (3).

Cur. adv. vult.

SIR J. CAMPBELL C.:—

This was a claim against the County Council for damages or compensation by reason of malicious injury to a plough, the property of the claimant. Malice was not disputed, and Ronan L.J., before whom the case came on appeal as a Judge of Assize, measured the compensation for the actual injury at £2, with a further sum of £3 5*s.*, being consequential damage for the period during which he has found as a fact that it was not possible for the claimant to have his plough repaired; but at the request of the County Council he has stated two questions for decision by this Court. The first is a comparatively trifling matter, and arises in the following way. Under the Grand Jury (Ireland) Act, 1836 (6 & 7 Wm. 4, c. 116), the right to compensation for malicious injury to property is confined to certain specified subject-matters, but by the Local Government (Ireland) Act, 1898, sect. 5, sub-s. 1, this right was extended to all property real and personal, with the limitation that the injurious act must be a crime punishable on indictment under the Malicious Damage Act, 1861. By sect. 51 of that Act any person committing unlawful and malicious injury to property, for which no punishment is otherwise provided by the Act, is declared to be guilty of a misdemeanour, provided the damage or injury is to an amount exceeding £5. The County Council contend, and we think rightly, that for the purposes of this section the element of consequential damage must be excluded, and they therefore insist that, as the actual damage to the plough in this case did not exceed £5, the claim for compensation entirely fails. They would be plainly right in their conclusion if nowhere else in the Act is punishment provided for malicious injury to a plough, and therefore the answer to this first question plainly depends upon the effect to be given to a previous section,

(1) 7 H. & N. 79. (2) 34 I. L. T. R. 76. (3) 35 I. L. T. R. 203.

No. 15, which makes it a felony for anyone unlawfully and maliciously to cut, break, or destroy, or damage with intent to destroy, or to render useless any machine or engine used or intended to be used for ploughing. The County Council contend that a plough is neither a machine nor an engine used or intended to be used for ploughing within the meaning of this section, but I confess that when I heard Mr. Leonard, as counsel on their behalf, putting forward this contention, I felt, as the late Lord Justice Barry used to say, that my intellect was capsized, as I had thought it elementary that a machine or engine for ploughing would include every suitable device or contrivance designed for the purpose. My confidence, however, in this belief was rudely shaken by a reference to the case of *Rose* v. *Carlow County Council* (1), in which Johnson J. held that a plough was not a machine or engine for ploughing within this section, and my mental balance was only restored when Mr. Smyth, for the claimant, retorted with the case of *R.* v. *Gray* (2), in which the Judges of the English Court for Crown Cases Reserved unanimously held on this same section that a plough was a machine or engine for ploughing. The judgment, which was pronounced by Erle C.J., was probably one of the shortest on record in that Court, and was in these words: "We are all agreed that there is nothing whatever in the objection." Why Johnson J., before whom this case was cited, declined to follow a decision of such high authority is a mystery which the report fails to elucidate, but we approve and adopt its language and conclusion.

The second question arising in the case is one of much greater interest and far-reaching importance, affecting, as it does, the principle upon which the amount of compensation is to be ascertained in all such claims in respect of malicious injury to property. Is the amount to be assessed upon the basis that the county at large or such portion of it as the Court shall direct the amount to be levied upon is liable only as an insurer, or is the injured person to receive such an amount as he would in ordinary circumstances be entitled to receive as damages in a civil action against the actual wrong-doer for the act committed by him? The distinction is vital, inasmuch as in the

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(1) 34 I. L. T. R. 116.

(2) 10 Jur. N. S. 160.

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former case the liability would be confined to the intrinsic value of the property injured, while in the latter it would include such further damages as were the natural and reasonable consequences of the injury itself. For example, in the case of the malicious burning or destruction of a plantation of ornamental timber in the vicinity of a mansion-house, or a belt of trees forming shelter and shade for the house of a farmer, a sum that would merely represent the market value of the timber might be wholly inadequate as compensation for consequential injury, and so in the case of plantations intended for the preservation of game or for shelter and protection for horses and cattle. The wanton destruction of a sluice, worth in itself but a few shillings, might entail upon the owner loss and damage running into hundreds of pounds, and the malicious burning of a factory or mill might, apart altogether from the value of the buildings or materials, ruin the business of the owner, or at least paralyse his trade for a season or for years. Similarly, the malicious destruction of machinery, farming implements, the tools of a mechanic, the workshop or stock-in-trade of the humblest tradesman might cripple his industry for an indefinite period. Indeed, in many cases in which the injury is the work of a combination or organization, the aim of the perpetrators is the ruin of their victim by depriving him of his means of livelihood. In such cases the mere equivalent in money of the value of the property injured or destroyed must fall very short of the compensation which would restore the party injured to his original position.

It is not perhaps possible precisely to determine the principle upon which compensation was assessed in such cases during the long period when, prior to the passing of the Local Government (Ireland) Act, 1898, the jurisdiction was exercised by the Grand Juries. The late Lord Justice Holmes is reported to have said, in the case of *Brackley Co-Operative Society* v. *Tyrone C.C.* (1), to which we have been referred, that in his experience consequential damages had never been allowed; but, if I may refer to my own experience for twenty years in such cases on the North-East Circuit, I am aware that such claims were frequently made; but as the award in practice took the form of a lump sum, I am unable to say to what extent, if at all, effect was given to them. Since the transfer in 1898 of the jurisdiction to the County Court Judge retaining the right of traverse or appeal to the Judge of Assize, there seems to have been a conflict of judicial opinion on the question, for while Holmes L.J., in the case I have mentioned, decided that no consequential damages could be awarded, the late Lord O'Brien C.J., as appears from the note or report of the case of *Duffy* v. *Mayo C. C.* (1) (see notes in Vanston's "Local Government," vol. ii, p. 1235), adopted and acted upon the contrary view, as also has Molony C.J. in a recent cattle-driving case, in which he allowed the owner of the cattle compensation, not only for the deterioration of the animals, but also for the loss of their market. It is also certain that, until the recent decision of this Court in the case of *Ballymagauran Co-Operative Agricultural and Dairy Society* v. *Cavan and Leitrim C. C.* (2), to which we have been referred by Mr. Smyth in his concise and able argument, and with which I will deal later on, the true principle of compensation in such cases has never been determined, either in the King's Bench Division or in this Court.

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(1) 1 N. I. J. 146.

I shall, therefore, in the first instance, deal with the question on principle as a case of first impression, and, so regarding it, I am wholly at a loss to understand upon what ground any resulting damage, which is the natural consequence of the malicious injury inflicted, can or should be excluded from the compensation to be awarded, and I am equally satisfied that no such intention is to be gathered from the existing legislation on the subject. O'Connor L.J., in the course of the argument, called our attention to the original legislation on the subject in Ireland, which, though since repealed, is a most useful guide to the meaning and object of the existing Malicious Injuries Code. It is quite plain that the governing principle of this repealed legislation was to give the applicant such compensation as he ought to receive as satisfaction and amends, sometimes referred to as "full amends," for the injury done to him, and that the liability of the county was to be ascertained and measured as if the claim was in fact made by ordinary civil process against the actual wrong-doer. The substituted legislation of the Grand Jury Act (6 & 7 Wm. 4, c. 116),

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(1) Unreported.

(2) [1915] 2 I. R. 85.

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which is the existing law on the subject, appears to us to have been so framed as to preserve this principle for all intents and purposes. It provides by sect. 135 that the injured party is to receive such sum or sums of money as he ought to receive for the injury or damage, while sect. 136 expressly contemplates compensation for any loss or damage occasioned by the malicious injury. Compensation prima facie implies indemnity, just as in all legislation dealing with the compulsory acquisition of lands the basis of compensation is the value of the property to its owner, and not to the person acquiring it; but the most appropriate test of the measure and meaning of compensation in the Malicious Injuries Code is supplied by the principle which regulates the ascertainment of damages in civil actions in tort.

In such cases, what is aimed at and contemplated by the law is "restitutio in integrum," or, to quote from Halsbury's "Laws of England," vol. x, p. 302: "The great underlying principle by which the Courts are guided in awarding damages is 'restitutio in integrum.' By this is meant that the law will endeavour, so far as money can do it, to place the injured person in the . . . position he occupied before the occurrence of the tort which adversely affects him." It follows therefore that the claimant in all these cases of malicious injury is entitled not merely to the value of the property injured, but to compensation for all loss or damage which is the natural and direct consequence of the wrong that has been done to him. Our decision to this effect is fortified by the judgments of this Court in the important case of *Ballymagauran Co-operative Agricultural and Dairy Society* v. *County Councils of Cavan and Leitrim* (1), in which a case had been stated by Holmes L.J. in the following circumstances. The plaintiffs had obtained a decree for £100 compensation for damage to their creamery, and on appeal before Holmes L.J., as Judge of Assize, upon proof that they had the premises insured for £400, he held that this insurance must be taken into account in assessing the compensation, and inasmuch as it exceeded the amount of the injury, no compensation was payable. The present Solicitor-General, in his argument in that case on behalf of the county councils, admitted that under the repealed Irish legislation the injured person was entitled to full compensation, as the ratepayers were in the position of trespassers, and the compensation was not limited to the actual loss, but contended that the position was altered by the Grand Jury Act, as the ratepayers under it were no longer regarded as trespassers, and that this fact, coupled with the use of the word "ought," showed that their liability was limited to the actual loss sustained by the applicant. He cited no authority and stated no ground, so far as appears from the report, for the proposition that the ratepayers had ceased to be regarded as wrong-doers, while, as I have already stated, the expression "ought" in the section of the Grand Jury Act is precisely the same as that in the repealed legislation, and is used in the same connexion. Lord Shandon C., while apparently of opinion that the county was not placed in the position of a trespasser, was emphatic in the view that the right of the claimant arose by reason of a trespass, a wrongful act involving the destruction of the property, and that to the extent of some compensation the county in lieu of the wrong-doer is made liable. He states on p. 94: "When the old action was abolished by sect. 139 (of the Grand Jury Act), and the new proceedings, equally based on the doing of a wrongful act and compensation by innocent persons, were substituted, I should have thought, apart from authority, that so far from there being a different principle involved, the principle would be the same, although the amount to be recovered might probably be less." I was puzzled for a time to understand how, so long as the same principle of compensation was applied, the amount to be awarded might probably be less; but I have come to the conclusion that the Lord Chancellor had present to his mind the consideration that though the liability was still to be that of a trespasser, the element of damages described as vindictive, so often legitimate in an action against the actual wrong-doer, might probably be excluded when the claim was against the county. In reference to this element, the law in regard to it is stated in Halsbury's "Laws of England," vol. x, p. 306, as follows: "Where the wounded feeling and injured pride of a plaintiff, or the misconduct of a defendant, may be taken into consideration, the principle of 'restitutio in integrum' no longer applies. Damages are then awarded not merely to recompense the plaintiff for the loss he has sustained by reason of the defendant's wrongful act, but to punish the defendant in an exemplary manner, and vindicate the distinction between a wilful and an innocent wrongdoer. . . . Such damages may be awarded in an action for tort, as, for instance, assault, trespass, negligence, nuisance, libel, slander, seduction, malicious prosecution, and false imprisonment." This particular point does not arise for decision in the present case; but I see no reason why these considerations should not apply to claims under the statute, at least in cases where the injury was proved to be an act in a widespread conspiracy of intimidation and terrorism of a particular individual or class; and it will be noticed that the other members of the Court apparently assume the principle to be unqualified in its application. Palles C.B., after a review of the former English and Irish legislation, says on p. 100: "All of these statutes are in pari materia, and I cannot find any trace in them of the difference relied on by Mr. Henry of the hundred in England being treated as in a different position from the barony in Ireland. Neither hundred nor barony is treated as the actual wrongdoer, but in each it is placed in the stead of the wrongdoer"; and further on, at foot of the same page: "I am of opinion, as held in *Mason* v. *Sainsbury* (1), as regards England, so also in Ireland, although the hundred, barony, or county is not criminally responsible, it is for civil purposes put in the place of the wrong-doers." This explicit statement in a considered judgment in this Court deprives of all weight an expression of opinion to the contrary attributed to Palles C.B. in the case of *English* v. *Kerry County Council* (2), in which he is reported to have said: "Under the section the people of the county or locality in which the injury was committed were not treated as wrong-doers." Moriarty L.J., in concurring, says, p. 103: "I regard the distinction which Mr. Henry contended for between 'the English statutes' and the Act of 1836, namely, that in the former statutes the inhabitants were treated as trespassers, and that in the Act of 1836 the county is not treated as a trespasser, as a distinction which, if not fantastic, is not sufficient to entitle him to succeed. Though the county is

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(1) [1915] 2 I. R. 85.

(1) 3 Doug. 61.

(2) 34 I. L. T. R. 76.

not treated as the actual wrong-doer, it is put in the place of the wrong-doer, and made answerable for his act."

We have, therefore, no hesitation in deciding that in all claims for malicious injuries under the Act of 1836, as extended and applied by the Local Government (Ireland) Act, 1898, sect. 5, the amount to be awarded where the claim is proved should include compensation for all loss or damage which is the natural and direct consequence of the injury inflicted, or, in other words, that the same principle is to be applied as if it were a civil action in tort against the actual wrong-doer himself. The effect of our decision may aggravate the burden upon the innocent ratepayer, but it may also afford, as the statute intended, a salutary stimulus to his efforts for the prevention of crime and for the detection of offenders. We shall answer both questions submitted to us in the affirmative, with the result that the decree of the County Court Judge is affirmed with costs, including the costs of the appeal, and the claimant must also have the costs of this hearing, which we measure at £12 12*s*.

RONAN and O'CONNOR L.JJ. concurred.

Solicitor for the applicant: *M. M'Keon.*
Solicitor for the respondents: *J. Delany.*

R. ST. J. C.

Appeal.
1919.
Dec. 5, 8.

IN RE WORKMEN'S COMPENSATION ACT, 1906. IN THE MATTER OF AN ARBITRATION BETWEEN MARY DENNIS, APPLICANT; THE MIDLAND RAILWAY COMPANY, LTD. (NORTHERN COUNTIES COMMITTEE), RESPONDENTS (1).

Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58)—*Accident—Engine-driver—Death supervening from pneumonia.*

An engine-driver, who had to take out an early train, was, on a morning in March which was bitterly cold and snowy, called late by a fellow-workman, and hurried to his engine, insufficiently clad, and without his usual food. On the same or the following day, as to which there was a conflict of evidence, whilst engaged in his employment, he collapsed, and subsequently died of pneumonia.

Held, that the death was not the result of an injury by accident within the meaning of the Workmen's Compensation Act, 1906.

This was an appeal from an award dated the 3rd day of October, 1919, of the Recorder of Londonderry, whereby he ordered that the respondents should pay the sum of £300 to the dependants of James Dennis, late of Waterside, Londonderry, deceased, as compensation for the injury resulting to such dependants from the death of the said James Dennis on the 1st April, 1919, from injury caused to the said James Dennis on the 26th day of March, 1919, by accident arising out of and in the course of his employment by the Midland Railway Co., Ltd. The deceased man was employed by the railway company as an engine-driver, and each alternate week had to take out a train leaving Londonderry at 5 a.m. On the mornings on which he was engaged on early duty it was customary for him to be "knocked up" at 4 a.m. by a "knocker-up," who was himself an employee of the Company engaged on night cleaning, but this was done by private arrangement between the men, and there was no evidence that the railway company was responsible for this practice. On a certain morning (the 24th or the 25th March, 1919, as to which there was a conflict of evidence) the deceased was not "knocked up" until 4.45 a.m., when, according to the applicant's evidence, which was accepted by the arbitrator, "he bounced out of bed, hurried into some clothes, and rushed out without having his clothes fastened or his boots laced, and was in the engine-shed five minutes after he was awakened. He had no overcoat on. He usually took one with him in cold weather. It was a wild, snowy morning, and bitterly cold . . . He had no food before rushing out on this morning, and did not take food with him. He usually had food before he went out on the early run, and took food with him. He was in perfectly good health and spirits on this morning when he rushed out." The applicant further stated that her husband returned as a passenger in the 2.30 p.m. train to Derry on the same day ghastly-looking and very ill, and according to the evidence of the fireman on the deceased's engine the deceased man had collapsed after the train had arrived at Coleraine at about 9.30 a.m. This witness, however, as did a witness called on behalf of the railway company, deposed that the sudden illness and collapse of the deceased occurred on the day following the incident of his being "knocked up" late. The man died of acute pneumonia on the 1st April. A medical witness stated that he thought the pneumonia was due to exposure, but could not swear definitely that it was caused by the exposure on the early morning deposed to; that it was probably caused by this exposure; that the risk would be greater on an engine, especially if a man had not an overcoat and had been in the habit of wearing one, and if he was not fed as usual, as his power of resistance would then be less; and that a very cold day would increase the risk. He further stated that it would be quite usual for pneumonia to develop the second day after the exposure to cold.

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(1) In the Court of Appeal, before SIR J. CAMPBELL C., O'CONNOR M.R., and RONAN L.J.

The arbitrator reported as follows :—"I find as a fact that the 'knocking up' in the early morning was an incident of the employment of an engine-driver, although it was not a rule of the company that he should be so 'knocked.' I find as a fact that Dennis contracted pneumonia by reason of exposure on the engine between Derry and Coleraine, and that it was exposure arising out of and in the course of his employment as engine-driver, and that the exposure was occasioned by the failure to knock him up at the usual time, and his having to hurry to be in time for his train without being fully clothed or fed as usual."

The railway company appealed to the Court of Appeal.

Wylie K.C. and *Begley* (*The Right Hon. the Attorney-General, Denis Henry K.C.*, with them), for the appellants:—

This award cannot be sustained. The applicant "must satisfy the arbitrator that the bacillus infection which is said to constitute the accident invaded his system under such circumstances that the accident arose 'out of and in the course of the employment'": per Lord Birkenhead C. in *Innes or Grant* v. *G. & G. Kynoch* (1). Here, if the incident of the deceased being "knocked up" late can be regarded as an accident, it did not arise "out of and in the course of the employment." There is no evidence that the railway company was responsible for the "knocking up." "Some particular occurrence happening at some particular time" must be established: per Lord Birkenhead C. in *Innes or Grant* v. *G. & G. Kynoch* (2). If the accidental occurrence was the attack by the bacilli of pneumonia, there is nothing to connect it with the man's employment. Here the germs may have attacked him before he left his house at all, or the moment he opened his door on that morning, or in the street. The foot-plate of an engine is an unlikely place for such germs to be found. In *Brintons, Limited,* v. *Turvey* (3) there was the fortuitous presence in the wool of the bacillus which attacked the man, and the further fortuitous circumstance of the escape of the bacillus from the fan used for disinfecting the wool, and affecting the man. In *Broderick* v. *London County Council* (4), where enteritis was contracted by a workman who had inhaled sewer-gas in the course of his employment, and in *Eke* v. *Hart-Dyke* (5), where a gardener was ordered to open cess-pools, and contracted ptomaine poisoning by sewer-gas, the element of accident was held absent. See also *Warner* v. *Couchman* (6). In *Innes or Grant* v. *G. & G. Kynoch* (1) the bacilli were present in large numbers where the man was working, and there was a fortuitous alighting of the bacillus on an abrasion of the leg from which he was suffering. Pneumonia may be contracted anywhere. In *Drylie* v. *Alloa Coal Co.* (7) there was the abnormal circumstance of the workman being

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(1) [1919] A. C. 765, at p. 771.
(2) [1919] A. C. 765, at p. 772.
(3) [1905] A. C. 230, 232.
(4) [1908] 2 K. B. 807.
(5) [1910] 2 K. B. 677, 688.
(6) [1911] 1 K. B. 351.
(7) [1913] S. C. 549.

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immersed in icy-cold water owing to the accidental stopping of the pump when the men were at work in the pit. In all the cases in which the contraction of disease has been held accidental there was proof of "some occurrence which is accidental, and is extraneous to the disease itself," that occurrence being "referable to the employment," and it must be possible "in a reasonable sense to fix the date at which the 'accident' happened." See judgment of Lord Wrenbury in *Innes or Grant* v. *G. & G. Kynoch* (1). Proof of such element is wholly wanting here: *Steel* v. *Cammell, Laird, & Co.* (2).

E. S. Murphy K.C., *Wood K.C.* (*M'Guckin* with them), for the applicant:—

It is now well settled that the contraction of disease may be "accidental" within the meaning of the Act. In the present case there is clear evidence of circumstances exceptional, abnormal, and unexpected which led to the contraction of the disease. The man was called up late; he rushed out to his work, unfed, and without being properly clothed, his vitality being thereby lowered; the morning was bitterly cold and snowy, and he contracted the disease, to which in the circumstances he was exceptionally exposed.

The Lord Chancellor.—How can you rely on the fact that the man was called late? The uncontradicted evidence in the case is that the "knocking up" was a matter of private arrangement between the men, for which the company was not responsible.

Murphy K.C.—Even if there is no evidence to support the finding of the arbitrator on this point, that does not conclude the case. The contraction of the disease in the circumstances proved was an untoward event; "it was unexpected in what seems to me the relevant sense, namely, that a sensible man who knew the nature of the work would not have expected it": per Lord Loreburn in *Clover, Clayton, & Co., Ltd.*, v. *Hughes* (3).

In *Glasgow Coal Company, Ltd.*, v. *Welsh* (4) the application succeeded because of "the extreme and exceptional exposure to

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(1) [1919] A. C. 765, at p. 798.

(2) [1905] 2 K. B. 232.

(3) [1910] A. C. 242.

(4) [1916] 2 A. C. 1.

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cold and damp" to which the workman was subjected on the occasion in question. Lord Shaw there said: "Injury by accident is a composite expression. It includes a case like the present, namely, the contraction of disease, arising from extreme and exceptional exposure" (p. 10). The case is ruled by the decision of this Court in *Sheerin* v. *Clayton & Co.* (1), where a workman died from the effects of immersion in cold water in which he was working, and it was held that the death was caused by an accident. In *Ismay, Imrie, & Co.* v. *Williamson* (2), where the injury was caused by a heat-stroke, the conditions in the stoke-hold, where the man was working, were perfectly normal; it was the man's physical debility that subjected him to the attack. Here the deceased's lowered vitality and weakness, occasioned by the facts as found, rendered him peculiarly susceptible to the attack of the germs of pneumonia in circumstances of extreme and exceptional exposure, in the same way as the debility of the workman in *Ismay's Case* (2) rendered him susceptible to the heat-stroke, and the abrasion on the leg of the workman in *Innes' Case* (3) rendered him susceptible to the attack of the bacillus. In each of these cases the workman was subjected to an additional and abnormal risk not common to the other workmen in similar employment, and which was unexpected and fortuitous in its nature. See also *Brintons, Ltd.*, v. *Turvey* (4). It is sufficient for us to say that there was evidence to support the findings of fact arrived at by the arbitrator.

Begley, in reply.

The following cases were also referred to: *Stewart* v. *Wilsons Clyde Coal Co., Ltd.* (5); *Fenton* v. *Thorley & Co., Ltd.* (6); *Morgan* v. *SS. Zenaida* (7).

(1) [1910] 2 I. R. 105.
(2) [1908] A. C. 437.
(3) [1919] A. C. 765.
(4) [1905] A. C. 230.
(5) [1902] 5 F. 120.
(6) [1903] A. C. 443.
(7) 2 B. W. C. C. 19.

Sir James Campbell C. :—

We do not consider it necessary to reserve judgment in this case. The learned County Court Judge appears to have regarded the failure to give the deceased man the usual signal to rise on the morning in question—whether it was the morning of the 24th or the 25th the County Court Judge has left in doubt—not merely as an accident which arose in the course of his employment, but as an accident which brought about the ultimate fatal consequences. In so far as that may have been the view of the County Court Judge, it has been abandoned by counsel for the respondent in this appeal, because they have finally taken up the position that the failure to call the man at the accustomed time was only relevant in so far as it affords an explanation of his having hurried from the house without having had his breakfast and without his overcoat—facts which it is said brought about a condition of possible or probable debility and weakness, leading subsequently to his becoming a victim of the microbes of pneumonia while engaged on his employers' business on a morning which has been described as snowy and bitterly cold, and when, it is suggested, owing to the want of his overcoat and his neglect to take his breakfast, he was unduly susceptible to this disease. It has been argued, accordingly, that the present case comes within the principle of the recent decisions in the House of Lords, to which we have been referred, and that the claim is sustainable. It seems to me, however, that if we were to extend the principle of these decisions to the facts of this case, it would be impossible to avoid the conclusion that in every case in which an employee contracts pneumonia in the course of his employment, and death supervenes, a claim for compensation could be sustained under the Workmen's Compensation Act—a result to my mind inconsistent with the language of the Act itself. I do not think any advantage would be gained by a reference in detail to the numerous cases which have been cited. I have read most of them, and there are, I think, to be found in the judgments in each of these cases certain passages which, if severed from their context, and taken apart from the facts of the particular case, might apply to this case in the applicant's favour. In the end, however, we

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are thrown back upon the language of the Act of Parliament itself; and the question we have to consider is whether the death of this unfortunate man resulted from injury by accident arising out of and in the course of his employment.

I think that counsel for the respondent were right in treating the alleged failure to call the man at the stipulated hour as irrelevant, first, because that incident did not in any way arise in the course of the man's employment; and, secondly, because it was not this failure, but the man's own failure to take his ordinary breakfast and to clothe himself in the ordinary way, which, as it is contended, rendered him more susceptible to infection from the germs of this disease. I am also of opinion that this claim fails in the absence of any evidence of extraordinary or unusual exposure, to which this man was subjected. In *Sheerin* v. *Clayton & Co.* (1) the workman was set to work at cleansing a drain up to his knees in water—work of a nature quite outside the ordinary course of that for which he was engaged; and I can well understand the decision of this Court, namely, that the sudden death of the workman, brought about by the disease caused by the sudden impact of the cold water in which he had been working, was a death resulting from injury by accident within the section. In the present case the only untoward or unexpected event which has been suggested is that on this morning in the month of March the weather was bitterly cold and snowy. March winds are proverbially cold and bitter, just as breezes in June and July are presumably mild and warm, and to say that because an engine-driver, who has to take his chance of meeting with every kind of weather from one end of the year to another, finds himself on one particular morning in March exposed to bitter wind and cold, he thereby meets with some fortuitous or unexpected occurrence, seems to me to be a straining of language. Employees in many departments of life, especially where their work requires them to be in the open air, are exposed to risks arising from excessive heat, or, it may be, from excessive cold or wet; but these are ordinary risks incidental to their employment, and where illness or death results to a workman merely by reason of his having been exposed to such risks, and without more, no claim under the Workmen's Compensation Act can in my judgment arise. We were referred to the case of *Brintons, Ltd.*, v. *Turvey* (1), where the workman died from anthrax, resulting from the germs of that disease having attacked him in a delicate and tender spot in one of his eyes. That case is, I think, clearly distinguishable from the present. In addition to the fact that the bacillus in that case struck the man by accident in the peculiarly susceptible spot in the eye, the operations which the workman conducted on behalf of his employers were carried on in circumstances which induced the presence of these germs, and the risk of the workman being attacked by the germs was therefore one which was incidental to his employment.

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(1) [1910] 2 I. R. 105.

In the present case, however, there has been no evidence whatsoever adduced that this engine-driver on the foot-plate of his engine was unusually exposed to the attack of these germs, or in any greater danger from them than if he had been a ticket-collector, or a porter on the platform, or any other employee of the company. So, again, in *Innes or Grant* v. *G. & G. Kynoch* (2), where the man who was attacked by the germs had gone to his work with an abrasion on his leg, which was found to have been the point of affection, the work the man was set to do was something out of the ordinary, and had to be performed under conditions which exposed him to the risk of being attacked by the germs present in large numbers in the bone-dust he had to handle, and which ultimately produced the disease which caused his death. No such element is to be found in the present case. The learned County Court Judge has not found, and I think could not have found on the facts of this case, that there was anything unusual in the weather conditions on this morning, and, as I have pointed out, there was no evidence that the particular position the deceased man occupied on the engine rendered him any more susceptible to attacks by the germs of pneumonia than he would have been otherwise. The incident of the man having left his house that morning without his usual food and clothing was a matter altogether outside the ordinary scope of the man's employment, and I think it was to get over this difficulty that an attempt was

(1) [1905] A. C. 230.

(2) [1919] A. C. 765.

made before the County Court Judge to prove that the railway company was responsible for this practice of calling the man in the morning, and that this was done for the benefit of the railway company, and was a term of the employment. This contention broke down as the evidence developed, and I find nothing to justify a finding of fact, if, indeed, the County Court Judge arrived at any such finding, that the failure to call up the deceased man at the usual time was an incident for which the railway company was in any way responsible; and if this occurrence could by any straining of language be regarded as an accident, it was not an accident arising out of the employment. For these reasons, and without entering into an elaborate examination of the authorities, I am of opinion that this case cannot be brought within the statute, unless we are prepared to go the length of laying down the proposition that in every case where a workman during the course of his employment is attacked by the germs of a disease which subsequently brings about his death, a claim for compensation can be sustained under the Act. The authorities have not extended the principle to this length as yet, although I think only a somewhat fine line of distinction remains between the exclusion of the claim in a case such as the present and the inclusion of practically all claims in respect of a workman in the course of his employment having fallen a victim to disease of any kind which ultimately results in death. In my opinion this appeal must be allowed with costs.

O'Connor M.R.:—

In expressing concurrence with the Lord Chancellor, I have only a few observations to make, and I do not propose to go through the many decisions which have been quoted. They are of the highest authority, and must bind this Court; but in the most recent case, *Innes or Grant* v. *G. & G. Kynoch* (1), Lord Buckmaster said: "The words of the statute have been open to much criticism. Simple as they appear to be, their application to particular incidents has been found so difficult that the law reports are full of various decisions, each attempting—and attempting in vain—to provide some fixed canon of interpretation from which a rule can be established for future guidance."

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(1) [1919] A. C. 765, 773.

The facts of each case must be the main subject for consideration, and there is the danger of losing sight of the facts if too much attention is paid to decisions in other cases in which the facts are not the same.

The question arising on this appeal is whether the accident resulting in the personal injury arose out of and in the course of the employment of the workman. The personal injury was pneumonia, alleged to have been caused by exposure on a very cold morning while driving an engine. The exposure in itself cannot be regarded as an accident. It would much more fitly be described as an incident of the employment. The variability of the weather, although it cannot be gauged, is not accidental. It is in the ordinary course of natural phenomena; nor can anyone say that a bitterly cold morning in the month of March is an untoward event or a mishap. The accident must, therefore, be found in some circumstance other than the state of the weather.

It is said that the workman was insufficiently clad for protection from the cold; that his clothes were not properly put on, his coat not buttoned up, his shoes unlaced; that he did not bring with him his usual pot of tea essential for warmth. These are facts, but they do not make an accident. He may have mounted the engine insufficiently clad and unsupplied with ordinary comforts. But he did this of his own resolution. There was no accident in the mounting of the engine apparelled as he was.

To get at the element of accident we must go back farther. The insufficiency of outfit for the railway journey is alleged to be due to the accident that the workmen overslept himself, and as a result had not time to dress himself properly or to supply himself with a tea-can before he started to take his place on the engine. The oversleeping is alleged to have been due to another accident: that he was not called, as was customary, by a fellow-workman. If he was not called by his fellow-workman, it is possible that the omission was due to another accident, but it is unnecessary to inquire so far into the sequence of accident. It is no matter where the train of accident commenced, for it is obvious the whole line of accident was outside the course of the workman's

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employment, which did not commence till he presented himself to take up his duty at the railway. Up to that moment he was off duty. There is no evidence that his duty commenced at any certain time, or that the railway company owed any previous duty to him. It was alleged that the company assumed the duty of calling him, but this is directly contrary to the evidence, which was that the calling was a voluntary courtesy practised by the railway servants to one another. In my opinion, there is no evidence of accident in the course of the workman's employment. This is sufficient for my judgment.

RONAN L.J.:—

As my two colleagues are in agreement as to the result of this case, my opinion becomes of no practical importance, and accordingly, as they had arrived at a clear conclusion on the matter, I suggested to the Lord Chancellor that it would be useless to adjourn the case in order that I might give a dissertation on the authorities. I only desire to say that if my opinion could have had any practical result, I would have wished for an opportunity of more fully considering the authorities bearing on the question involved.

Solicitors for the appellants: *Miller & Babington.*
Solicitor for the respondent: *G. Conaghan.*

R. ST. J. C.

THE MAYOR, ALDERMEN, AND BURGESSES OF THE COUNTY BOROUGH OF WATERFORD *v.* ELLEN MURPHY, TRADING AS MURPHY & CO.

K. B. Div.
1919.
Nov. 6.

(1919. No. 896.)

Waterford Bridge Act, 1906 (6 *Edw.* 7, *c.* 76)—*Statute—By-laws—Ultra Vires—By-law having the effect of statute—"Conclusive as to the validity"—Waterford Bridge Act,* 1906—*By-law as to "time and mode" of passage of vessels—Power to make a charge.*

The Waterford Bridge Act, 1906 (6 Edw. 7, c. 76), under which the Corporation of the City of Waterford were authorized to purchase the old bridge across the river Suir then existing, gives power to the Corporation to make by-laws as to the "time and mode of vessels passing through" the existing bridge or any new bridge to be erected. By sect. 10 of the said Act "a printed copy of such by-laws . . . purporting to be made and confirmed under the authority of this Act and signed by an Assistant Secretary of the Board of Trade shall be conclusive evidence of the validity of such by-laws . . . in any prosecution or proceeding under the same for any purpose." By-law No. 1, made under this section, provided for the time and mode of vessels passing through, and imposed a charge of £1, to be paid when the bridge was required to be opened at certain times.

The plaintiffs sued the defendant by civil bill for £5, money due by the defendant to the plaintiffs for attendance fees on the opening of the Waterford Bridge span to allow vessels the property of the defendant to pass through, and got a decree. The defendant appealed, and the Judge of Assize stated a case for the Divisional Court as to the validity of the by-law imposing the charge of £1.

Held, 1, that the by-law in so far as it imposed a charge was ultra vires, and 2, that the provision making a printed copy of such by-law "conclusive evidence of the validity" did not preclude the Court from inquiring into its validity.

Case Stated at the City of Waterford Summer Assizes, 10th July, 1919, by Lord Justice Ronan for the opinion of the King's Bench Divisional Court. The facts appear from the Case Stated, which was as follows:—

1. This was an appeal from a decree of the acting County Court Judge of Waterford for the amount claimed by a Civil Bill Process brought by the plaintiffs against the defendant for the recovery of five pounds, money due by the defendant to the plaintiffs for attendance fees on the opening of the Waterford Bridge span to allow vessels the property of the defendant to pass

(1) Before Dodd, Gordon, and Moore JJ.

through said bridge in pursuance of the Waterford Bridge Act, 1906, and the by-laws made thereunder.

2. From this decree the defendant appealed. It was admitted that the bridge had been opened on five occasions, for which the sum of one pound for each of such occasions was payable under the by-laws hereinafter referred to, if valid or unquestionable, by the Court.

3. The by-laws made by the plaintiffs on the 1st day of July, 1913, and confirmed by the Board of Trade on the 20th day of August, 1913, in pursuance of the Waterford Bridge Act, were put in evidence, and are deemed to be incorporated herewith. It was argued on behalf of the plaintiffs that No. 1 (*g*) of the by-laws above referred to was (*a*) not of itself ultra vires, and (*b*) if it was that the concluding paragraph of sect. 10 of the above Act prevented inquiry as to its validity. It was argued contra for the defendants.

The questions for the Court are: 1. Is No. 1 (*g*) of the said by-laws itself ultra vires? 2. If it is, can the question of its validity be inquired into by the Court, having regard to the concluding paragraph of sect. 10 of the Waterford Bridge Act, 1906? If either of the above questions be answered in the negative, the decree is to be affirmed with costs. If both be answered in the affirmative, the decree is to be reversed, and the Civil Bill dismissed with costs.

Sect. 10 of the Waterford Corporation Bridge Act, 1906 (6 Edw. 7, c. 76), was as follows: "The Corporation shall, as soon as reasonably may be after the purchase by them of the bridge undertaking, and from time to time as may be expedient, may alter by-laws, rules, and regulations with regard to the time and mode of vessels passing through the existing bridge, or any new bridge which may hereafter be substituted therefor . . . subject always to this provision, that all such by-laws . . . shall in the first place have been approved of by the Waterford Harbour Commissioners . . . and in every case the said by-laws, rules, and regulations, and any alteration thereof, shall be submitted for confirmation to the Board of Trade, and shall not until such confirmation have any force or validity. A printed copy of such by-laws, rules, and regulations purporting to be made and confirmed under the authority of this Act, and signed by an Assistant Secretary of the Board of Trade, shall be conclusive evidence of the validity of such by-laws, rules, or regulations in any proceeding or prosecution under the same for any purpose."

By-law No. 1 made under this section was as follows: "The bridge will be open for the passage of vessels from the 1st of October till the last day of February, both days inclusive, from half an hour before sunrise till half an hour after sunset, and from the 1st March to the 30th September, both days inclusive, from six o'clock a.m. to sunset. At all other times the bridge will be opened for the passage of steam vessels, on giving written notice, between 9 a.m. and 5 p.m., to the bridge overseer stating the time when the bridge is required to be opened, and on payment of a charge of one pound."

Gibson K.C. and *Kinahan*, for the plaintiffs:—

This by-law is not ultra vires. Sect. 10 of the Waterford Bridge Act gives the Corporation power to make by-laws regulating the extent to which river traffic should be allowed to interfere with road traffic. This comes within the word "time" in the section. It is true there is no express authorization to make a charge in the section, but the making of a charge for opening is implied in the word "mode." This by-law as to making a charge of a pound to cover the expense involved in opening the bridge at inconvenient times is reasonable: *Kruse* v. *Johnson* (1). The by-law is not repugnant to the constating instrument: *Thomas* v. *Sutters* (2). A by-law may impose a charge, though none is mentioned in the governing Act: *The Institute of Patent Agents* v. *Lockwood* (3); and by-laws should be construed benevolently: *Ex parte Davis* (4). The words "conclusive evidence of the validity" are peculiar to this Act, and preclude the Court from inquiring into the validity of the by-law. They also referred to *R.* (*Cleeland*) v. *Pharmaceutical Society of Ireland* (5); and *R.* (*Conyngham*) v. *Pharmaceutical Society of Ireland* (6); *Mackey* v. *Monks* (7); Taylor on Ev., 1906, vol. ii, pp. 1189–1195.

(1) [1898] 2 Q. B 108.
(2) [1900] 1 Ch. 10.
(3) [1894] A. C. 347.
(4) [1872] L. R. 7 Ch. 526.
(5) [1896] 2 I. R. 368.
(6) [1899] 2 I. R. 132.
(7) [1918] A. C. 59.

Swayne K.C., and *O'Byrne*, for the defendants:—

The Waterford Bridge Act contemplated the abolition of all tolls save those specifically preserved. Both the preamble and operative part of the Act indicate that, and show its scope. Sect. 10 does not give the Corporation power to impose a charge. Such a power must be expressly given, and cannot be implied. The words relied on as giving the power must be clear and unambiguous [Craie's "Stat. Law," 1911 ed., p. 119; *Oriental Bank* v. *Wright* (1); *Re Micklethwait* (2); *Leeds and Liverpool Canal Co.* v. *Hustler* (3)]. No such power is given here.

The portion of the by-law imposing a charge is ultra vires; and this Court is not precluded by the words of the section from inquiring into its validity. *The Institute of Patent Agents* v. *Lockwood* (4) does not apply, for there the power given to the Board of Trade to make regulations was a general one, while here the power given is limited to regulating the "time and mode" of the passage of vessels.

Gibson K.C., in reply.

GORDON J.:—

This matter comes before us on a case stated by Lord Justice Ronan at the last Waterford Summer Assizes. [His Lordship read the case stated.] The proceedings were commenced by a civil bill brought by the Waterford Corporation against Mrs. Ellen Murphy, trading as Murphy & Co., to recover £5, money due by the defendant to the plaintiffs for attendance fees on the opening of the Waterford Bridge span to allow vessels the property of the defendant to pass through the said bridge in pursuance of the Waterford Bridge Act, 1906, and the by-laws made thereunder. As to the amount in dispute, there is no question. The fact that defendant's vessels passed the bridge is admitted. The point made before the Lord Justice was that No. 1 of the by-laws made by the Corporation of Waterford relating to the bridge is ultra vires because it imposes a charge. The questions for the decision of the Court are [His Lordship read the questions].

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(1) 5 A. C. 842.

(2) [1855] 11 Ex. 452.

(3) 1 Barn. & Cress. 424.

(4) [1894] A. C. 347.

The Act of 1906 is before us, and it gives the history of the original bridge at Waterford, which was erected under powers conferred by an Act of Parliament dated 1786. In the course of the argument Mr. Kinahan stated that at first the old bridge had no opening to allow vessels to pass through, but that some time after it was erected an opening was made, and that charges were sought to be imposed for allowing vessels to pass through this opening; but as we have no evidence of that before us, we cannot take it into account. The river at Waterford is tidal, and consequently is prima facie a public highway, open and free to all members of the public in so far as the right of passage has not been lawfully, that is, by statute or other lawful means, interfered with. The object of the Act of 1906 was to enable the Corporation of Waterford to purchase the undertakings and rights of the owners of the old bridge; and provided that the old bridge or any new bridge to be erected in substitution for it should be, as regards road traffic, toll free. That Act did not itself specifically give the plaintiffs power to erect a new bridge. This power is derived from an Order in Council (1) made under the Bridges Acts. The regulations as to road traffic, and the rights, powers, and duties of the Corporation in regard to it, were settled by the Act; and what we have to consider are rights, powers, and duties in regard to river traffic. The Corporation had power, and it was their duty, to leave a sufficient opening for ships to pass through. Parliament did not itself directly prescribe the regulations for this traffic, but gave power to the Corporation to frame rules and by-laws subject to the approval of the Harbour Commissioners and to confirmation by the Board of Trade. Sect. 10 of the Act defines the scope of the power to make such rules and by-laws, and is as follows:—[His Lordship read sect. 10.] The subject-matter of the proposed rules and by-laws is set out, and it is to deal with the "time and mode" of vessels passing through. There is no reference to tolls or charges or anything in the nature of a toll or charge. This seems to indicate that it was the intention of the Legislature that the public right of passage should be preserved, subject to rules to be made by the Corporation, with the approval of the Harbour Board, regulating the passage of vessels in such a way as not to unduly interfere with road traffic or the navigation of the river respectively. The Corporation say "we have made a charge approved of by the Harbour Commissioners and confirmed by the Board of Trade; it is true we have no direct power to impose a charge, but the words at the end of sect. 10 in effect put this by-law in the same position as an Act of Parliament."

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(1) 29 March, 1910: see *Dublin Gazette*, 5th April, 1910.

The section says:—"A printed copy of such by-laws . . . shall be conclusive evidence of the validity of such by-laws, rules, or regulations in any prosecution or proceeding under the same for any purpose." This was intended to make the printed copy conclusive evidence that all necessary requirements had been complied with in the making of the by-laws. It is clear that the word "such" relates back to such by-laws as could be made under the earlier part of the section; that is to say, it is limited to by-laws with regard to the "time and mode" of vessels passing through. The interpretation which the Corporation seek to put on the section is that once the Board of Trade have confirmed a by-law the power to make it cannot be questioned. We cannot think that this is so. It is said that *The Institute of Patent Agents* v. *Lockwood* (1) is an authority for that interpretation; but it is clear from Lord Herschell's judgment that the ground of the decision in that case was the generality of the words used. That case turned on the construction of certain sections of the Patent Designs and Trade Marks Act, 1888, sect. 1, sub-s. 2, of which provided: "The Board of Trade shall make such general rules as are in the opinion of the Board required for giving effect to this section, and the provisions of sect. 101 of the principal Act (the Act of 1883) shall apply to all rules so made as if they were made in pursuance of that section." Sect. 101 of the Act of 1883 provided that "the Board of Trade may from time to time make such general rules . . . as they think expedient, subject to the provisions of this Act, for regulating the practice of registration under this Act." By sub-s. 3: "General rules may be made under this section, . . . and shall (subject as hereinafter mentioned) be of the same effect as if they were contained in this Act, and shall be judicially noticed." In that Act care was taken to protect the right of Parliament to object, for sub-s. 4 provided that: "Any rules made in pursuance of this section shall be laid before both Houses of Parliament"; and sub-s. 5 provided: "If either House of Parliament, within the next forty days after any rules have been so laid before such House, resolve that such rules or any of them ought to be annulled, the same shall after the date of such resolution be of no effect." In commenting on these words, Lord Herschell says at p. 356: "It is impossible, to my mind, to conceive wider language than that which is used in the second sub-section of the first section of the Act of 1888. The truth is, the legislation is a skeleton piece of legislation left to be filled up in all its substantial and material particulars by the action of rules to be made by the Board of Trade. . . . It seems to me that thereupon it was their duty to make all the rules necessary for making the legislation contemplated by the section effective." It is not necessary for me to refer again to the Act to show that the scope and extent of the section here is wholly different, and that there is a clear and definite restriction imposed by sect. 10 on the subject-matter of the intended by-laws. The case of *Mackey* v. *Monks* (1), which was cited by the plaintiffs, puts the case no further. I would not say that it might not be reasonable to enable the Corporation to make some one pay for extra work entailed by opening the bridge at certain times, nor do I suggest that either the Corporation or the Board of Trade thought they were exceeding their powers in making the by-laws. But we have to construe the section as it stands, and we are of opinion that in so far as the by-law imposed a charge it is ultra vires, and that the words of sect. 10 do not preclude this Court from inquiring into the validity of the by-law. The question put to us by the learned Lord Justice is concerned solely with the legality of charging a fee for the opening of the bridge. We express no opinion on the other limits of the powers of the rule-making authority. We are unanimously of opinion that the answer to both the questions put by the learned Lord Justice should be in the affirmative; that the decree of the County Court Judge must be reversed, and the civil bill dismissed with costs.

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(1) [1894] A. C. 347.

Dodd and Moore JJ. concurred.

Solicitor for the plaintiffs: *P. A. Murphy.*
Solicitor for the defendants: *G. A. Nolan.*

H. H.

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(1) [1918] A. C. 59.

Appeal.
1919.
Nov. 20.

MARGARET ROSSITER, Applicant; COMMISSIONERS OF THE PORT OF WATERFORD, Respondents (1).

Workmen's Compensation—Selection of dangerous route—Alternative and safe route available—Workmen fatally injured—Accident arising out of and in course of employment—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *sect.* 1, *sub-s.* 1.

A mate employed on a dredger had to shift about from side to side for the purpose of performing his duties. He elected to cross the vessel by an obviously dangerous, but not prohibited, route, although an alternative and comparatively safe way was available. He was caught between platform and mast, and sustained injuries which resulted in his death.

Held, that the accident arose out of and in the course of the employment. There is a distinction between the case of a workman who, whilst actually engaged in the work of his employer, resorts to a dangerous route or method, and that of a workman who, though still under his contract of service, acts similarly for his own convenience or advantage.

Appeal from an order of the acting County Court Judge of Waterford (Mr. A. F. Blood K.C.) dismissing the application of Margaret Rossiter, the appellant, for compensation under the Workmen's Compensation Act.

The appellant was the widow of Thomas Rossiter, killed on June 16th, 1919, in the course of his employment on a dredger belonging to the defendants. Rossiter was mate on board the dredger which was engaged in dredging the river near Waterford. The dredger was kept in position by ropes and an anchor. Rossiter's duties were to shift the dredger every ten minutes or quarter of an hour. His duty took him to all parts of the ship.

The evidence of the captain of the dredger describing the accident was as follows: "On the 16th June I was dredging and delivering the stuff into a barge alongside, and used forward crane from dredger for discharging into barge. The crane took half a circle when discharging into barge, i.e., it was carried from port to starboard. Rossiter would report to me when barge was full, and barge was on starboard side. Rossiter's position was on port side, but he would require to shift about from side to side in the performance of his duties. Three minutes before accident I saw Rossiter on port side attending to his duties. When I next saw him he was lying on the deck. The forward crane was then fore and aft, i.e., hanging over vessel." In cross-examination the witness said: "The forward crane works on a pivot, and consists of jib, over which the bucket-chain works, and a platform on deck; the platform moving as crane slews round and in front of platform (looking forward); there is a mast (the only one); when crane is fore and aft, platform comes close against mast, but if slew of crane be to port or starboard, the space between mast and platform is six feet. It is a dangerous operation to cross between mast and platform when crane is working. I have warned men not to cross. I warned Rossiter not to cross between platform and mast when crane working, the danger being that men might be caught between mast and platform when crane returning from slew to fore and aft position. The warning I gave had been prior to that day; and I had heard Rossiter warning others not to cross that way. On foreside of mast there was a clear passage, but it was awkward to go that way, as you have to step over a couple of pipes nine inches over deck." No written notice warning men not to cross between platform and mast when the crane was working was posted, and the warning given by the captain was "a matter of friendly comradeship."

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(1) Before Sir James Campbell C., and Ronan and O'Connor L.JJ.

The learned Judge disallowed the widow's claim, ruling that the accident did not arise out of the employment, as the deceased by crossing the deck at the point he did incurred an unnecessary and added risk; that there was an alternative safe crossing place (with only a slight obstruction) at foreside of mast; and that the practice of crossing at place of danger was not shown to be authorized or recognized by respondents: *Lancashire and Yorkshire Railway Co.* v. *Highley* (1) appeared to him to apply.

Sealy K.C. and *J. P. Kenny,* for the appellant:—

Serious and wilful misconduct is not a defence where an accident causes the death of a workman. Here the point raised

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(1) 10 B. W. C. C. 241.

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by the other side is that the accident did not arise out of the employment. The proper inference from the evidence is that it was left to the discretion of the workmen to choose the way by which they would cross the ship. There is no suggestion that the deceased was not at the time of the accident engaged in the execution of his duties under his contract of service.

In *Highley's Case* (1) the workman was engaged in doing something for his own convenience; and the principle of the decision there does not apply to a case like the present, where the workman was clearly acting within the sphere of his employment. Authorities cited: *Blair* v. *Chilton* (2); *Barnes* v. *Nunnery Colliery Co.* (3); *Astley* v. *Evans & Co.* (4); *Robertson* v. *Allan Brothers & Co.* (5); *Harding* v. *Brynddu Colliery Co., Ltd.* (6); *Plumb* v. *Cobden Flour Mills Co.* (7); *Gane* v. *Norton Hill Colliery Co.* (8).

Hanna K.C. and *Dockrell*, for the respondents:—

The Court of Appeal should not interfere lightly with a finding of fact by the County Court Judge. We admit that the accident in this case took place in the course of the employment, but we submit that it did not arise out of the employment. By doing something he was not required to do Rossiter took a risk independent of his employment and outside it, and exposed himself to an added peril: *Lancashire and Yorkshire Railway* v. *Highley* (1).

They referred to: *Fitzgerald* v. *W. G. Clarke & Sons* (9); *Weighill* v. *South Hetton Coal Co.* (10); *Losh* v. *Richard Evans & Co.* (11); *Herbert* v. *Fox* (12); *Baker* v. *Bradford* (13); *Naylor* v. *Musgrave Spinning Co.* (14); *Powell* v. *Brynddu Colliery Co.* (15); *M'Keown* v. *M'Murray* (16); *Conway* v. *Pumpherston Oil Co.* (17); *M'Laren* v. *Caledonian Railway Co.* (18); *Callaghan* v. *Maxwell* (19).

(1) 10 B. W. C. C. 241.
(2) 8 B. W. C. C. 324.
(3) [1912] A. C. 44.
(4) [1911] 1 K. B. 1036.
(5) 1 B. W. C. C. 172.
(6) [1911] 2 K. B. 747.
(7) [1914] A. C. 62.
(8) [1909] 2 K. B. 539.
(9) [1908] 2 K. B. 796.
(10) [1911] 2 K. B. 757.
(11) 19 T. L. R. 142.
(12) [1916] A. C. 405.
(13) 9 B. W. C. C. 436.
(14) 4 B. W. C. C. 286.
(15) 5 B. W. C. C. 124.
(16) 45 I. L. T. R. 190.
(17) [1911] S. C. 660.
(18) [1911] S. C. 1075.
(19) 2 F. 420.

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Sir James Campbell C. :—

Although this case is not free from some doubt which is still entertained by O'Connor L.J., we have come to the conclusion that the representatives of the deceased were not disentitled to recover compensation. The real question is: did the accident arise out of as well as in the course of the employment? Persons injured while still under their contract of service have been held disentitled to compensation because the facts and circumstances pointed, in the opinion of the Court, to the conclusion that the accident did not arise out of although it did arise in the course of the employment. There are a number of cases in which a workman coming to or returning from work, retiring for dinner or for other purposes, and having a safe avenue of approach and departure, elected, even with the permission or implied authority of his employer, to go by an obviously dangerous route, and in these conditions the Courts have held that he was not entitled to recover. The true principle of these cases is the distinction between the position of a workman actually engaged in the execution of the work for which he is employed, and that of a workman who, though still under his contract of service, is executing something for his own convenience.

In this case I might have come to a different conclusion if the County Court Judge had held that the operation of crossing the dredger by this dangerous track had been expressly forbidden, and that disobedience on the part of their servants had not been winked at by the employers. But the County Court Judge is silent on the point. He refers to the evidence, but does not come to any conclusion. On the evidence I think it would be difficult to find that there was any prohibition by the employers or any precaution taken by them by fencing or otherwise to obviate danger. The absence of that finding is an important feature of the case; and when I come to consider the decision of the County Court Judge it seems to me to amount to this: the workman having an alternative path, which was quite safe to cross the dredger, recklessly resorted to one which was obviously dangerous, and which he knew to be dangerous. Having regard to this finding, he dismissed

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the claim, considering himself bound by *Highley's Case* (1). In coming to that decision he failed to take into consideration the cardinal distinction between the case of a workman engaged in the execution of his master's business, and that of a workman engaged in some object which, though consistent with his contract of service, was not for the benefit of his employer, but for his own immediate purpose or advantage.

Accordingly, in the absence of any finding that this method of crossing the dredger was prohibited, I think it is clear that the accident arose out of and in the course of the employment; and, if so, the dependant is not disentitled to recover compensation merely because the alternative path taken by the deceased was under possible conditions a dangerous one. To hold that she is excluded would be to lose sight of the principle asserted in a number of authorities, namely, that if the servant whilst engaged in the work of his employer resorts to a dangerous route instead of selecting an alternative safe one, that act of his per se is not enough in the absence of prohibition to rule out his dependant's claim. The contrary opinion of the County Court Judge was wrong in point of law, and his decision must be reversed.

RONAN L.J.:—

I am of the same opinion. The County Court Judge disallowed the claim, ruling—1, that the accident did not arise out of the employment, as the deceased by crossing the deck at the point he did incurred an unnecessary and added risk; 2, that there was an alternative safe crossing place; and 3, that the practice of crossing at place of danger was not shown to be authorized or recognized by respondents. There is nothing in these findings to show that there was a prohibition against crossing by the route which the deceased took. All the County Court Judge says is that there was no direct evidence of authority to cross there. Therefore, the whole case rests on this: that in doing his work and for the purpose of doing it the deceased had to cross the ship at this particular time. He could have got across in comparative safety. There was a short way, which was dangerous, and because he crossed by that way the County Court Judge says the accident did not arise out of the employment. He says that in his opinion *Highley's Case* (1) applied. Perhaps the best way of showing that that case does not apply is by reading the judgment of Lord Sumner. He says: "I think that on the uncontradicted evidence . . . the present is the case of an accident arising not out of but outside of the employment, since at the time of his death the workman was in no sense doing that which was part of or fell within his employment (whether he was or was not acting with care therein), but was for his own purpose, namely, the convenience of the moment, thoughtlessly pursuing a course which fell outside of his employment." In that case the workman had crossed the railway lines to obtain hot water for breakfast. The ratio decidendi in that case has no application to the facts in the present case.

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(1) 10 B. W. C. C. 241.

I have come to the conclusion that the decision of the County Court Judge was wrong in point of law, and ought to be reversed. In my opinion, *Durham* v. *Brown Bros. & Co.* (2) governs this case. In that case a workman reached a tank by a ladder not intended for the purpose, and met with an accident which caused his death. The Lord President in his judgment assumed that the facts as found proved against the workman that he was negligent in choosing a palpably dangerous way to the tank. "But," he adds, "the fact that a man takes a wrong way to do his work does not prove that he is not at the time in the course of doing it." The workman had no reason to go to the tank except to do his duty. He was, therefore, in the course of his employment, and the accident arose out of his employment. The very clear decision in *Durham's Case* (2) has never been questioned.

O'Connor L.J.:—

In this case I do not carry the opinion I have formed to the length of dissenting from the judgments just pronounced, so far as the facts of this case are concerned.

But I wish to guard myself by saying this: My present impression is that a workman engaged in his master's work may

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(1) 10 B. W. C. C. 241.

(2) 36 S. L. R. 190.

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disentitle himself if, in doing a thing prima facie within his employment, he voluntarily, deliberately, and with full knowledge chooses, for his own convenience, to do it in a fashion which involves an obvious risk of serious personal injury. My colleagues think this case is not of this class; and though I doubt our power to interfere with the County Court Judge's finding, still I can see no useful purpose in a further consideration of it or in withholding my concurrence.

Solicitors for the appellant: *P. Murphy & Co.*
Solicitor for the defendants: *M. Good.*

C. L.

PETER DEVLIN, Appellant; BERNARD CONLIN, D.I.R.I.C., Respondent. JOHN DEVLIN, Appellant; BERNARD CONLIN, D.I.R.I.C., Respondent (1).

K. B. Div.
1919.
Nov. 4, 12.

*Illicit distillation—"House or place"—"Proprietor or occupier"—Trespasser—Absence of knowledge—*1 *&* 2 *Wm.* 4, *c.* 55, *s.* 17.

The word "place" in 1 & 2 Wm. 4, c. 55, s. 17, has its full ordinary meaning, and is not controlled in any way by its proximity to the word "house"; and "proprietor or occupier," in the same section, cannot be one whose land has been invaded without his knowledge, but is some one in immediate actual control of the place where illicit distillation is carried on.

Cases Stated for the opinion of the Court at the instance of defendants pursuant to the Summary Jurisdiction (Ireland) Act, 1857 (20 & 21 Vict. c. 43).

Peter Devlin's Case.

At a Petty Sessions holden in and for the Petty Sessions district of Gortin, County of Tyrone, on Friday, the 8th day of August, 1919 . . . one Peter Devlin . . . was charged in and by a certain summons for that on the 10th day of July, 1919, he had without being lawfully authorized thereto in land occupied by him in Leckin . . . one vat containing eighty-nine gallons of wash, and one barrel containing thirty-eight gallons of wash, preparing or prepared for illicit distillation, contrary to 1 & 2 Wm. 4, c. 55, s. 17.

And the said parties respectively being then present, the charge was duly heard before us, and upon such hearing we ordered that the defendant be convicted and fined one hundred pounds, mitigated to six pounds.

And whereas the said Peter Devlin hath pursuant . . . &c., required us to state and sign a case . . . &c.

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(1) Before Gibson, Kenny, and Pim JJ.

Now we the said Justices, pursuant . . . &c., do hereby state and sign such case . . . as follows:—

At the hearing of the said complaint it was proved on the part of the complainant that the defendant is a farmer in the townland of Leckin. On the 10th day of July, 1919, complainant went down to the river or stream which adjoins the defendant's lands, and noticed that some sods had been cut off the bank. Further down he found the sods, and when he removed them, and the timber underneath, he found two holes in the ground in defendant's field, and two barrels containing wash, apparently ready to be distilled, sunk in them. Complainant proved that defendant admitted to him that the land was his, but denied that he knew anything of the making of poteen. It was also proved by complainant that it was only a distance of about twenty-five yards from the spot where the two barrels of wash were found in defendant's field to a spot where a still-house was found in a field belonging to John Devlin in Glenark at same time, and that the illicit material found in defendant's land, and in John Devlin's land, appeared to be all for use at the same still-house. The river was almost dry at this spot, and persons could easily walk from the one farm to the other. The defendant's dwelling-house is some distance from the spot where the wash was discovered, several fields intervening between his house and the stream, the distance from his house being about 400 yards, the place where the barrels were concealed not being visible from the defendant's house.

No evidence was given to show that the defendant was at any time engaged in the manufacture of illicit spirits, or that he was aware that the wash was concealed on his land.

Defendant himself was not a competent witness, and no evidence was called on his behalf.

The complainant admitted that he had no search warrant at the time he went on the lands of the defendant.

The solicitor for the defendant contended that the proceedings in this charge being brought under sect. 17, &c., . . . a conviction could not be obtained against the defendant, as the complainant had not procured a special warrant for a search, as prescribed by sect. 17, and that the proceedings should have been taken under sect. 18, if either sect. 17 or sect. 18 was applicable to the facts of this charge.

Defendant's solicitor further contended that the word "place" in the phrase, "any house or place," should be interpreted as a place in the nature of a house or other building or structure, and that the word "place" should be read as ejusdem generis with "house," and that on that interpretation of the word "place" the prosecution could not be brought at all under either sect. 17 or sect. 18.

Defendant's solicitor further contended that the proper and only section of the Act under which the prosecution could be brought is sect. 28, which provides that "if any person shall permit or knowingly suffer any private distillation of spirits to be carried on in any house, outhouse, yard, garden, land, or premises belonging to or in the occupation of such person, such person shall forfeit £60, subject to the mitigation hereinafter mentioned."

Complainant quoted the case of *Doherty* v. *M'Clelland* (1), and urged that the word "place" in sect. 17 . . . would include a field or any other place where illicit distillation was intended to be, was being, or had been carried on. He further urged that it had been clearly proved that illicit material was found on land owned and occupied by defendant, and the owner and occupier was made liable by sects. 17 and 18, when it was proved, as it had been in this case, that the place was one where illicit distillation was being carried on. It was not necessary to prove that the illicit material was on defendant's land with his permission or knowledge.

Complainant further contended that sects. 17 and 18 should be read in conjunction, and both in conjunction with 20 & 21 Vict. c. 40, sects. 5 and 6, and 14 & 15 Vict. c. 93, sect. 39.

Complainant applied to have the summons amended by adding sect. 18 thereto, but we refused to amend; we agreed, however, to make a note of his application. We held by a majority that the prosecution could be properly brought under sect. 17 of the Act, and we accordingly convicted the defendant, and imposed the penalty of £100, mitigated to the sum of £6.

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(1) 28 L. R. Ir. 168.

The opinion of the Court is sought as to whether we were right in law in convicting defendant under said sect. 17 and imposing the said penalty.

JOHN DEVLIN'S CASE.

In John Devlin's case (from the same Petty Sessions) the charge was "that on the 10th day of August, 1919, he had, without being lawfully authorized thereto in lands occupied by him in Glenark, in said, &c., two barrels each containing a small quantity of fresh wash, and one still-house, recently used, and other materials preparing or prepared for illicit distillation; also half a pint bottle containing a small quantity of illicit spirits, contrary to 1 & 2 Wm. 4, c. 55, sect. 17."

The facts were set out as follows:—At the hearing of the said complaint it was proved on the part of the complainant that the defendant is the owner and occupier of a large farm containing 187 acres in a mountain district, adjoining which a mountain stream runs. On the 10th day of July, 1919, complainant discovered on defendant's lands a still-house, which appeared to have been recently used, close to the said stream, built up with large stones, and to it had been cut over defendant's field a small watercourse to convey water to the still-house; a half pint bottle containing a small quantity of illicit spirits was found near the still-house in defendant's field. There were also two barrels and a tub on defendant's land close to the still-house; each of the barrels contained a small quantity of wash. Defendant's meadow, in which the still-house was erected, was beaten down and trampled. Constable M'Loughlin, a witness for the complainant, proved he had a conversation with the defendant, who admitted that the land was his, but that he knew nothing of the still-house. The distance from the defendant's house to the still-house was proved to be about 600 yards, the still-house itself not being visible from defendant's house, but smoke from it could be visible. There was a beaten path from the still-house through the rough ground by the stream, and alongside defendant's meadow and his adjoining field leading up towards the defendant's house. The defendant himself was not a competent witness, and no evidence was called on his behalf. The complainant admitted that he had

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no search warrant at the time he went on the lands of the defendant. There was no evidence whatever that the defendant took any part in the distillation of spirits, or that he had any knowledge that the articles specified in the summons were on his property.

(The remaining facts of this case and the contentions at the Petty Sessions were similar to those in Peter Devlin's case.)

Murnaghan, for the appellants:—

The section deals with offences in a "house or place." "Place" must be read ejusdem generis with "house." The section speaks of "breaking open." Guilty knowledge is under the section conclusively presumed: *Doherty* v. *M'Clelland* (1). To make the construction of the section reasonable the extent of the "house or place" must be limited to the house and its immediate surroundings. In *R.* (*Wall*) v. *Gallagher* (2), O'Connor-Morris C.C.J. held that a bog was not a "place" within sect. 19. I rely upon a similar argument in the present case. The magistrates have negatived guilty knowledge, and the section should not be extended to cover a case such as the present.

H. O. Holmes, for respondent:—

Knowledge is not necessary: *Doherty* v. *M'Clelland* (1). "Place" need not be ejusdem generis with "house," but may be anywhere sufficiently localized: *Kempton Park Case* (3); *Brown* v. *Patch* (4). These latter were cases under the Betting Acts.

Cur. adv. vult.

Gibson J.:—

The argument before us was addressed to the meaning of the words "house or place" and "proprietor or occupier" in sect. 17 of 1 & 2 Wm. 4, c. 55, on which the prosecution was founded, counsel for the Devlins contending that "house" means a structure for human habitation, or at least some kind of building, and that "place" has a similar restricted effect; while counsel for the complainant urges that "place" extends to any place whatever; that the proprietor or occupier of the place used for illicit distilla-

(1) 28 L. R. Ir. 168.
(2) 31 I. L. T. R. 156.
(3) [1899] 1 A. C. 143.
(4) [1899] 1 Q. B. D. 896-7.

tion is liable, notwithstanding that the place is far distant from his abode, as here; that he is unaware of the illegitimate use of his premises; and that such unlawful use of his land is trespassory; on which view the owner of a large mountain estate would be responsible for clandestine illegality of unknown marauders.

The Act was a consolidation statute for repression of illicit distillation, and must be construed as a whole, so as on the one hand not to defeat its paramount object, and on the other not to produce absurdity and manifest injustice. Sect. 17, followed by sect. 18, deals with premises directly actually used for illegal production, but its language must be read in connexion with previous and subsequent sections not discussed in argument. Sect. 2 obliges the occupier of land on which an unentered kiln is placed to remove same on notice, if the actual owner or keeper of the kiln cannot be discovered. Sect. 6 authorizes entry of a mill or store and search for malt. Sect. 16 provides that any person having "in his possession in any dwelling-house or in any out-building, place, or premises occupied by him" any apparatus or materials for distillation is to be liable to a fine of £100, and the apparatus or materials are to be forfeited. Sect. 18, confined, like sect. 17, to the actual illegal process, authorizes entry and seizure without any restrictive condition as to locality. Sect. 19 deals with persons present where the illegal process is going on, and speaks of the proprietor or person in whose possession the illicit apparatus and materials shall be found. The power of entry and destruction given by sect. 20 may be exercised in any place. Under sect. 21 the landlord or proprietor of any land or premises in which a still shall be found may seize the same. The reference to "land and premises" shows that "place" in sect. 17 cannot be confined to a building like a house. Sect. 22 punishes anyone who keeps or knowingly permits to be kept illicit spirits in a penalty of £100.. Oddly, sect. 28 makes persons permitting illicit distillation in any house, out-house, yard, garden, land, or premises belonging to or in the occupation of such persons, only liable to a penalty, not of £100, but £60.

On the above sections I have no doubt that "place" in sect. 17 has its full ordinary meaning, and is not controlled in any way by its neighbourhood to the word "house."

The remaining point is: who is the proprietor or occupier of the house or place in which the seizure is made who is liable to forfeit £100? It cannot be an owner or occupier whose land has been invaded without his knowledge: he cannot be legally responsible for unlawful proceedings of a trespasser. Such trespasser would have for the time being a tortious occupation de facto. The proprietor or occupier is obviously some one in immediate actual control of the place where the illicit distillation is carried on. That a still has been secretly set up on lands by some unknown person is a situation contemplated by the statute, and the duty of the owner or occupier in such a case is prescribed in language inconsistent with the extravagant view that, however innocent of knowledge or connivance, he is to be punished for the sins of the unknown malefactors. A proprietor or legal occupier is not compelled to keep a staff to patrol his lands, however extensive, and is not made responsible for undiscovered illegal use of his property by furtive wrongdoers. Real possession usually implies knowledge: *Reg.* v. *Woodrow* (1); but rateable occupation is not inconsistent with tortious occupation of another person adversely to the rightful occupier. The cases stated negative permission or guilty knowledge, and we must take it that the materials and still-house were put in the Devlins' lands as an act of pure trespass. In John Devlin's case there is a good deal to suggest that he must have been aware of what was going on, so that he could have been sued under sect. 28; but we cannot over-rule the Justices on their conclusion of fact.

Kenny and Pim JJ. concurred.

Solicitors for the appellants: *Alex. E. Donnelly.*

Solicitor for the respondent: *Sir Henry Arthur Wynne* (*Chief Crown Solicitor*).

J. B. B.

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(1) 15 M. & W. 404, at p. 419.

Appeal.
1919.
Dec. 8.

REPRESENTATION OF THE PEOPLE ACT, 1918. ANNE CAMPBELL, SENIOR, APPELLANT; WILLIAM JOHN PURDY, RESPONDENT (1).

Franchise—Claim—Particulars—Forms—Representation of the People Act, 1918—*Order in Council* (*25th June*, 1919).

Where a claim to the franchise (parliamentary or local government) is made by one person on behalf of another, it is essential to the validity of the claim that the prescribed form should contain a declaration giving the same particulars as to the person on whose behalf the claim is made as that person would be required to give if he were claiming on his own behalf, and the omission of such particulars cannot be cured by the subsequent proof thereof to the satisfaction of the registration officer.

By an Order in Council, dated the 25th June, 1919 (1919, No. 886), amending Schedule III (Registration Forms for Ireland) of the Representation of the People Order, after reciting that by the Representation of the People Act, 1918 (thereinafter referred to as "the Act"), as amended by the Representation of the People (Amendment) Act, 1918, power was conferred on His Majesty to make provision for various matters by Order in Council; that by the Representation of the People Order such provision had been made; and that by sect. 40, sub-s. 2, of the Act any Order in Council made thereunder might be revoked or varied by any subsequent Order in Council, it was ordered that the Representation of the People Order should be amended by the substitution of the forms thereafter following for the forms of claim to be registered, Nos. 1 to 8, inclusive, in Schedule III.

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(1) In the Court of Appeal, before O'CONNOR M.R., and RONAN and O'CONNOR L.JJ.

Form 3, the substituted form, to be adopted where one person claims on behalf of another, is as follows:—

Registration Unit Polling District

CLAIM BY ONE PERSON ON BEHALF OF ANOTHER.

To the Registration Officer
For the Constituency of
Address

I hereby claim on behalf of of
that he (she)
should be registered as an elector for

(*a*) the constituency of
(*b*) the local government electoral area of

in respect of*

and I hereby declare that†

Signed
Address

Date

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* Here insert qualification (e.g. residence at , occupation of business premises at , occupation of dwellinghouse at , or husband's occupation of shop at , &c.), and full postal address and description of qualifying premises.

† Here must follow a declaration giving the same particulars as to the person on whose behalf the claim is made as that person would be required to give if he were claiming on his own behalf. (See Forms 1 and 2.)

NOTE.—The Act provides that when a claim is made by one person on behalf of another the name is not to be entered on the register unless the matters required to be stated in the declaration made by a person claiming on his own behalf are proved to the satisfaction of the registration officer.

Any false declaration made for the purpose of this claim will render the person signing the declaration liable to a penalty.

Appeal.
1919.
CAMPBELL
v.
PURDY.

On the 4th August, 1919, the foregoing form was signed by one William Cunningham on behalf of the above-named appellant, who claimed to be entitled to the parliamentary and local government franchise in respect of the occupation of a dwelling-house and premises at Coalisland, Co. Tyrone. The form was duly filled in as to the name and address of the claimant and the qualifying premises, but her age, and the statement that she was a British subject (being two of the particulars required by forms 1 and 2) were not included. These matters were, however, subsequently "proved to the satisfaction of the registration officer."

The County Court Judge, before whom the matter came on appeal, reported as follows:—"The question of law raised on this appeal, heard at a Court held before me at Omagh on Friday, the 24th day of October, 1919, was as to whether it was competent for the deputy registration officer, at the hearing before him, to receive evidence to supply the omission of any of the averments from the declaration in Form 3, prescribed by the Forms Order (25th June, 1919).

"I held that the said deputy registration officer was wrong in his view that the omission from the declaration in Form 3, prescribed by the said Forms Order, of all or any of the required averments, could be cured at the hearing of the claim by receiving evidence of such omitted fact or facts, and I accordingly allowed the appeal."

The claimant appealed to the Court of Appeal.

T. M. Healy K.C. and *Murnaghan*, for the appellant.

A. B. Babington K.C. and *J. Baxter*, for the respondent.

O'CONNOR M.R.:—

In this case the appellant, Annie Campbell, claimed to be entitled to the franchise in respect of certain qualifying premises, and a claim purporting to be in accordance with the requirements of the Representation of the People Act, 1918, was made on her behalf by one William Cunningham. The claim signed by him on behalf of the appellant omitted two very important matters, namely, a statement as to her age, and a statement that she was a British subject.

Appeal.
1919.

Campbell
v.
Purdy.

O'Connor
M.R.

The form of claim depends in the first instance upon rule 10 of the First Schedule to the Representation of the People Act, 1918 :—

"The form of claim for a person making a claim on his own behalf shall contain a declaration of the qualification of the claimant to be registered, including a declaration that the claimant has attained the required age, and is a British subject, and of the character in which the claimant desires to be registered," &c. This applies to a claim made by a person on his own behalf. The rule then continues :—" Where a claim is made on behalf of a claimant by another person, the registration officer shall not enter the name of the claimant on the register, unless the matters required to be stated in the declaration under the foregoing provision are proved to his satisfaction."

There is a notable distinction between these two regulations. In the case of a person making a claim on his own behalf it is provided, not only that the claimant shall make the declaration mentioned in the rule, but that a false declaration of the claimant may involve a penalty ; whereas in the case of a claim made on behalf of another person it is sufficient to make the claim, and it remains for the registration officer to have the claim proved subsequently in such manner as he thinks right.

This distinction was recognized by the draftsman of the original forms of claim provided under Order in Council. No 1 of these forms, that provided for a person making a claim on his own behalf, contains a declaration to be made by the claimant as to his qualification, as to his age, and that he is a British subject ; whereas when we come to the form provided for the case of a claim made on behalf of another person, we find that it is a mere claim for that other person without any evidence whatever to support it, and it is left to the registration officer to call upon the person making the claim to produce evidence in support of it. This form was, however, found to be unsatisfactory. It left it open to an enterprising election agent to put in a claim on behalf of every person in the constituency whom he thought would support his party, whether an infant or an alien, and whether with or without the necessary qualification, with the possible result of throwing on the registration officer a very heavy duty, which it would be most difficult for him to discharge, in eliminating a large number of bogus claims. It became necessary, accordingly, to make certain amendments in the prescribed forms and by the Order in Council of the 25th June, 1919, three new forms were provided in substitution for those thereinbefore prescribed, of which new forms, No. 3 is that applicable to a claim made by one person on behalf of another. This form commences, "I hereby claim on behalf of, &c.," as did the earlier form, but the further words are added, "and I hereby declare that," followed by a blank space, with regard to which a marginal note provides: "Here must follow a declaration giving the same particulars as to the person on whose behalf the claim is made as that person would be required to give if he were claiming on his own behalf."

In other words, the person filling in this form must not merely claim on behalf of another person, but must make a declaration containing prima facie evidence of everything required by the form provided for a claimant in person. Although I can see the object of the change made, I do not think that the draftsman has carried out his purpose in a very happy way. Information is, no doubt, given as to what particulars the form is to contain, but this is done merely by reference to another form, and a person who wishes to fill up this form No. 3 cannot do so unless he has form No. 1 also before him. If the matters required to be contained in this declaration are essential, it is difficult to conceive why these essential matters do not appear in the form itself, instead of a mere blank being left, which it is necessary to fill up by reference to another form. The question then is, is it essential to the validity of the claim that the declaration should contain the matters which are here omitted? The words of the marginal note, which I have already referred to, are emphatic: "Here must follow"; and it is quite clear that this new Order in Council and everything contained in it are absolute, because sect. 13, sub-s. 2, of the Representation of the People Act, 1918, enacts that "His Majesty may by Order in Council prescribe the forms to be used for registration purposes . . . and alter the rules contained in the first schedule to this Act for the purpose of carrying this Act into full effect, or for carrying into effect any Act for the time being in force amending or affecting this Act. The rules contained in the first schedule to this Act and any Order so made shall have effect as if enacted in this Act."

It appears to me, therefore, that the form must be construed by us as if it were part and parcel of the original Act of Parliament itself; and unless we find in the body of the Act something inconsistent with this substituted form, containing, as it does, the mandatory words "then must follow," we must give effect to the form, and must hold, accordingly, that in the present case the form as filled up and signed was deficient in certain essential respects, namely, in not stating the age of the claimant and that she was a British subject.

For these reasons I am of opinion that the appeal must be dismissed.

Ronan L.J.:—I am of the same opinion, and for the same reasons.

O'Connor L.J.:—I agree.

Solicitors for the appellants: *Shields & Murnaghan.*
Solicitor for the respondent: *R. B. Maglaughlin.*

R. ST. J. C.

Appeal.
1919.
Dec. 9.

IN THE MATTER OF THE REPRESENTATION OF THE PEOPLE ACT, 1918 (1). BETWEEN MARY ANN QUINN, APPELLANT, AND WILLIAM J. SINCLAIR AND THE REGISTRATION OFFICER FOR THE COUNTY OF TYRONE, RESPONDENTS.

Parliament—Franchise—Woman—Married woman's qualification—"Husband entitled to be so registered"—Representation of the People Act, 1918 (7 *&* 8 *Geo.* 5, *c.* 64), *sect.* 4, *sub-s.* 1.

Under sect. 4, sub-s. 1, of the Representation of the People Act, 1918 (7 & 8 Geo. 5, c. 64), a woman is entitled to be registered as a parliamentary elector if she has attained the age of thirty years, and is not subject to any legal incapacity, and is entitled to be registered as a local government elector in respect of the occupation in the constituency of land or premises (not being a dwelling-house) of a yearly value of not less than £5, or of a dwelling-house, "or is the wife of a husband entitled to be so registered."

Held, that the words "entitled to be so registered" refer to the immediately foregoing qualifications, and consequently that the wife of a man who was entitled to the local government franchise in respect of premises other than a dwelling-house of a yearly value of less than £5 was not in that capacity entitled to the parliamentary franchise.

Mary Ann Quinn, of Ballindrait, in the County of Donegal, appealed to the County Court Judge of the County of Tyrone against the decision of the Registration Officer for the Division of Strabane, in the said county, refusing to enter her name upon the register as a parliamentary elector, the grounds of appeal, as stated in the notice, being "that being the wife of a person entitled to be registered in respect of a garden, the poor law valuation of which is £4 10*s*., I am entitled to be registered as a parliamentary elector under the provisions of sect. 4, sub-s. 1 (*c*), of the Representation of the People Act, 1918."

The County Court Judge, who disallowed the appeal by order dated the 24th October, 1919, reported as follows:—

"It was proved or admitted before me that appellant was the wife of a man entitled to be registered as a Local Government

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(1) Before O'CONNOR M.R., and RONAN and O'CONNOR L.JJ.

Appeal.
1919.
Quinn
v.
Sinclair.

elector in respect of occupation of land or premises (not being a dwelling-house), whereof the poor-law valuation was £4 10*s*. I held that the Registration Officer was right in his determination, and I disallowed the appeal."

Mary Ann Quinn appealed to the Court of Appeal.

Murnaghan, for the appellant:—

The words, "a husband entitled to be so registered," mean a husband entitled to be registered as a Local Government elector, and do not refer to the immediately foregoing qualification; that being so, the appellant is entitled to the franchise.

Babington K.C., for the respondent, was not called on.

O'Connor M.R.:—

This is a very short point. It is to my mind clear that the words, "entitled to be so registered," mean entitled to be registered in respect of the premises mentioned in the clause. That being so, the decision of the County Court Judge was right, and must be affirmed.

Ronan and O'Connor L.JJ. concurred.

Solicitors for the appellant: *Shields & Murnaghan.*
Solicitor for the respondent: *R. B. Maglaughlin.*

R. ST. J. G.

Appeal.
1920.
Feb. 25.

DAVID WALLACE *v.* LADY MARGARET M'DOWELL AND ELEANOR HENRY MACKEOWN (1).

Practice—Probate—Undue influence—Particulars.

It is the settled practice of the King's Bench Division (Probate) not to require a party alleging undue influence to give particulars of the acts of undue influence.

So *held*, by the Court of Appeal (affirming Kenny J.).

Lord Salisbury v. *Nugent* (9 P. D. 23) followed.

APPEAL.

Margaret Ann Fulton, formerly of Belfast, executed a will dated the 13th December, 1899, and a codicil thereto dated the 14th December, 1905. For the purposes of this report it is only material to state that the said will contained a devise and bequest of all the residuary estate of the testatrix to Sir Alexander M'Dowell, the sole executor named in the will, upon trust to transfer the same to the trustees of the Presbyterian Church in Ireland. The testatrix died on the 27th April, 1906, and on the 13th February, 1907, probate in common form of the said will and codicil was granted to the said Sir Alexander M'Dowell. The property comprised in the residuary clause of the will amounted to upwards of £30,000.

Sir Alexander M'Dowell died on the 17th March, 1918, having made a will, probate of which was on the 15th May, 1918, granted to the above-named defendants.

This action was instituted on the 31st March, 1919, by the plaintiff, a nephew, and one of the next-of-kin of the said Margaret Ann Fulton, claiming that probate of the said will and codicil executed by her had been improvidently issued, and ought to be called in, and an amended probate granted, omitting from the will the said residuary devise and bequest, on the grounds—1, that the execution of the will, in so far as it consisted of the said devise and bequest, had been obtained by the undue influence of the said Sir Alexander M'Dowell; and 2, that the deceased did not know and approve of the contents of the said will in so far as the same consisted of the said devise and bequest.

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(1) In the Court of Appeal, before SIR JAMES CAMPBELL C., and RONAN L.J.

The defendants by their defence traversed the statements in the statement of claim, and counterclaimed that a grant of probate in solemn form of the said will and codicil should be made to them as executrixes of the said Sir Alexander M'Dowell, the executor appointed by the said will. A defence was also filed by the trustees of the Presbyterian Church in Ireland as intervenients, which, in addition to traverses, pleaded laches, acquiescence, and delay on the part of the plaintiff.

On the 13th November, 1919, the defendants served a notice on the plaintiff requiring the following particulars of the undue influence alleged in the statement of claim—" 1. What statements or acts are relied on as constituting such undue influence? 2. On what occasion or occasions is the same alleged to have been exercised? 3. On what date or dates is the same alleged to have been exercised?" To this notice the reply was given that "such undue influence was exercised during many years prior to the death of Margaret Ann Fulton, the deceased, and particularly at and about the times of the respective executions of the will and codicil referred to in the statement of claim." The defendants thereupon applied to Kenny J. for an order inter alia that the plaintiff should furnish further and better particulars of the said plea of undue influence, which application, so far as it related to the furnishing of such particulars, was refused by the learned Judge on the 30th January, 1920. Hence this appeal.

Hanna K.C. and *Andrews K.C.* (*H. M. Thompson* with them), for the appellants:—

The learned Judge in the Court below would have granted our application for further and better particulars but for the case of *Salisbury* v. *Nugent* (1), which he considered binding upon him. That case is not binding on this Court. We submit that there is no corresponding Irish practice. Under Order 19, rule 6, the plaintiff should have given particulars of the undue influence

(1) 9 P. D. 23.

Appeal.
1920.
WALLACE
v.
M'DOWELL.

alleged in his plea. As he has not done so, we are entitled to apply for an order. This is a very special case, as here the charge is made against a deceased man who cannot defend himself. His character, as well as a large sum of money, is at stake, and grave injustice may result if the defendants go to trial, being absolutely in the dark as to the nature of the charges they have to meet. If this were an action in the Chancery Division to set aside a deed on the ground that its execution had been obtained by undue influence, Order 19, rule 6, would clearly apply, and the defendants would be entitled to the order. A different practice should not prevail in the Probate Division of the High Court.

S. L. Brown K.C. (*T. Brown K.C.* and *Pringle* with him):—

We rely on the settled practice of the Court as laid down in *Salisbury* v. *Nugent* (1). [He was stopped by the Court.]

SIR JAMES CAMPBELL C.:—

This application, which is of great importance as affecting the practice in probate actions in this country, arises in the following way: A lady named Margaret Ann Fulton made her will in 1899, by which she appointed as her executor Sir Alexander M'Dowell, who has since died, and who was an eminent solicitor and a very leading citizen in Belfast, well known to most of us. The testatrix died in the year 1906, and probate of her will in common form was granted in the following year to Sir Alexander M'Dowell. One of the beneficiaries named in the will was the present plaintiff, David Wallace, who benefited thereby to some extent, the amount of which is immaterial; and so the matter remained until the month of March, 1919, when David Wallace issued a writ for the purpose of recalling the probate on the ground that it had been improvidently granted, inasmuch as the execution of the residuary clause, as he alleged, was obtained by the undue influence of the executor, Sir Alexander M'Dowell. He had died on the 17th March, 1918, a year prior to the commencement of the action, and the defendants in the present suit are his executrixes. The residuary bequest which is challenged was one to the trustees of the Presbyterian Church in Ireland, and comprises a

(1) 9 P. D. 23.

substantial sum of money, presumably the bulk of the property of the testatrix. The suit accordingly not only affects large pecuniary interests, but involves the character and reputation of a gentleman who, as I have said, was eminent and of high standing in his profession; and it would seem to us that if we were at liberty to do so, having regard to settled practice and the authorities to which we have been referred, this is a case in which we should direct the plaintiff to furnish the defendants with some real particulars of the undue influence, so far as he can consistently do so without disclosing the actual evidence on which he relies. Serjeant Hanna very properly relied on the provisions of Order 19, rule 6, which is in these words. [His Lordship read the rule, and continued:—] That appears to be a statutory recognition, in so far as these rules have a statutory effect, of the obligation of a person alleging undue influence to state the particulars in his pleading itself, and not to wait until he is asked to furnish such particulars; but I think it is the experience of every member of the profession that this rule, in so far as it directs particulars of undue influence to be stated in the pleading, has always been ignored in practice. We have been referred to the English case of *Lord Salisbury* v. *Nugent* (1), in which the Court of Appeal, consisting of very eminent Judges, held, affirming the Court below, that although the facts of that case were such that particulars of the undue influence alleged would have been desirable, they could not disturb the settled practice in England: not to require a party alleging undue influence to give particulars of the acts of undue influence on which he relied. That case was decided in December, 1883, and subsequent rules were framed in England under the Judicature Act, extending the previous rules in many respects, but from the date of that decision no attempt was made by any supplementary rule to alter the practice as there laid down, or to compel a party in a probate action to give particulars of a plea of undue influence. We are bound to have respect to decisions of the eminent Judges who decided that case, especially as the settled practice in Ireland appears to be the same as that in England. If it had been different, it is certain that some reported decision or some statement in a text-book would be found, declaring

(1) 9 P. D. 23.

the existence of such a right to particulars; but Serjeant Hanna had plainly admitted that the Irish practice had been identical with the English. Whatever our own views may be as to the desirability of compelling a party to give particulars of a plea of undue influence, especially where it is alleged against a person no longer living, I do not think that it would be right for this Court to interfere with this settled practice, supported as it is by the decision of the Court of Appeal in England in *Salisbury* v. *Nugent* (1); and I have the less hesitation in expressing this view in the present case, where the property is substantial, and the interests both of property and of character involved are so important, as it is open to the defendants to take the case to a higher tribunal. In my judgment the appeal must be dismissed.

RONAN L.J.:—

I entirely agree, and I only desire to call attention to one point in confirmation of what the Lord Chancellor has said in reference to the fact that no alteration has been made in the English rules subsequent to the decision in *Salisbury* v. *Nugent* (1) which would affect that decision. In *Hankinson* v. *Barningham* (2), reported in the same volume as *Salisbury* v. *Nugent* (1), Sir J. Hannen ruled that in an action for probate the Court would not order particulars to be given of incapacity. When the English rules came to be amended, the alteration effected by the present rule 25 (*a*) of Order 19 is very remarkable: "In probate actions it shall be stated with regard to every defence which is pleaded what is the substance of the case on which it is intended to rely; and further, where it is pleaded that the testator was not of sound mind, memory, and understanding, particulars of any specific instances of delusion shall be delivered before the case is set down for trial, and, except by leave of the Court or a Judge, no evidence shall be given of any other instances at the trial." So that the Legislature, with knowledge of the two decisions to which I have referred, deliberately altered the rules to meet the effect of one of these decisions, but left the decision in *Salisbury* v. *Nugent* (1) unaffected.

Solicitor for the plaintiff: *Martin J. Turnbull.*
Solicitor for the defendants: *S. MacKeown.*

R. ST. J. C.

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(1) 9 P. D. 23.

(2) 9 P. D. 62.

MURPHY *v.* ROSS (1).

Appeal.
1919.
Oct. 30.
Nov. 28.

Master and servant—Volunteer—Dangerous employment—Duty to instruct—Duty to employ competent servant—Common interest—Common employment—Negligence—Liability of master.

The plaintiff, a boy of eleven years, sued the defendant, a carrier, for damages for personal injuries occasioned by the alleged negligence of the defendant. The boy was directed by the defendant's foreman to accompany the driver of a horse and cart, in the defendant's employment, for the purpose of guiding the driver, who was a stranger to the district, on his proper route. There was evidence that the boy had been similarly directed by the foreman on previous occasions, and received small payments from the drivers, but he was never paid anything by the defendant. On the day in question, when the boy was accompanying the driver, and was sitting on the side of the cart, the driver, who was leading his horse up a lane, drew aside to pass another man, and one of the wheels of the cart caught in a rut in the water-table of the lane, with the result that the boy was thrown off, and sustained serious injuries. The defendant offered no evidence, and the learned judge at the trial directed a verdict for the defendant.

On an application for a new trial:

Held, by the majority of the Court of Appeal (Sir J. Campbell C. and O'Connor M.R., Ronan L.J. diss.), reversing the decision of the King's Bench Division, that the boy was not in the employment of the defendant or a fellow-servant of the carter, that he was not a mere volunteer, but was employed upon the invitation of the defendant's foreman, acting within the scope of his employment, to perform work in which both he and the defendant were interested, and that the case therefore ought not to have been withdrawn from the jury.

The doctrine of common employment, as applicable to children of tender years, considered.

Appeal.

The plaintiff, by his statement of claim, alleged that the defendant was a carrier in Cork, who in the course of his business used horse vehicles; that the plaintiff was a child of eleven years, and by reason of his tender age was unfit to be employed in or engaged in, or in any way exposed to the risk and dangers of the defendant's said business in riding on or being carried on the horsed vehicles of the defendant without the exercise on behalf of the plaintiff by the defendant, his servants and agents, of sufficient care for the plaintiff's safety; that on the 10th January, 1918, the servants of the defendant, in course of defendant's said business, and with the connivance, assent, knowledge, and permission of the defendant to so engage boys of the plaintiff's tender years, engaged the plaintiff for hire to accompany a horse and cart of the defendant and the servant of the defendant in charge thereof for the purpose that the plaintiff should act as a guide to the said servant, who was at the time a stranger to the City of Cork; and that while the plaintiff was so acting, and was at the time, owing to the negligence and neglect of the defendant's servant in charge, sitting in or on a dangerous and risky seat on the horsed cart of the defendant, the said servant of the defendant so negligently and unskilfully managed and guided the said horse and vehicle that he jerked and threw the plaintiff from his seat on to the road, so that a wheel of the cart passed over the right thigh of the plaintiff, causing such injury as to necessitate the amputation of the plaintiff's leg above the knee.

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(1) In the Court of Appeal, before Sir J. Campbell C., O'Connor M.R., and Ronan L.J.

The particulars of negligence pleaded were as alleged in the statement of claim, and "(*a*) the employment by the defendant, his servants and agents, or by the said servants and agents with the connivance, assent, knowledge, and permission of the defendant, his servants and agents, of a boy of the plaintiff's tender years, and unable on account thereof to take sufficient care of his safety in connexion or association with the danger arising from the defendant's horses and vehicles; (*b*) the negligence of the defendant's servant in allowing the plaintiff to occupy the seat alleged upon the defendant's said vehicle; (*c*) the negligence of the defendant's servant in so negligently managing and guiding the said horse and vehicle as to jerk the plaintiff from the said seat thereon, and directly cause the said injury."

The defendant by his defence traversed the averments in the statement of claim, and relied on the doctrine of common employment. He further pleaded that before and at the time alleged the plaintiff was voluntarily assisting and acting with a certain servant of the defendant in driving, managing, and guiding a horse and cart of the defendant; that the said servant of the defendant was a person of ordinary skill and care to drive, manage, and guide the said horse and cart, and that the alleged negligence was wholly unauthorized by, and was without the knowledge, licence, or consent of the defendant.

The action was tried before O'Connor L.J. and a common jury at the Spring Assizes, 1919, for the City of Cork, and the following summary of the evidence is taken from the report of the learned Lord Justice:—

The plaintiff deposed that he lived near the defendant's yard. The day before the accident Sullivan, the yard foreman, came to plaintiff's house. Plaintiff went to defendant's yard. He was directed by Sullivan to accompany John Kenny round the city. Sullivan had asked plaintiff's mother, and had given plaintiff directions; plaintiff spent that day with Kenny, going round the city; he got 3*d.* from Kenny. Plaintiff went back to Kenny the following day, and accompanied Kenny. They passed the defendant's office when going in or out. Plaintiff saw old Mr. Ross standing at the window of the office on the quay; plaintiff was on the cart when he saw him. On the 10th Kenny had a load to go to Goulding's; plaintiff was directing him; there was a rise of ground going to Goulding's. Kenny was leading his horse at the time of the accident. Plaintiff was sitting on left hand side of cart—on the side of the cart itself; he only remembered going up the lane, and being jolted off the cart.

Cross-examined.—He was twelve years old at the date of the hearing of the action; he had gone on carts before, and was often employed by Sullivan before to go round. The first occasion was a couple of months before the accident. The first day he went out a couple of journeys with Kenny; the second day he asked Kenny did he want him that day; Kenny said he would want him. Kenny and the plaintiff had been a journey to Goulding's the same day; this was the second journey; they had gone the same way. Plaintiff did not know how the accident happened. He was sitting on the cart on each occasion; the cart was loaded with soft stuff; he did not sit on the load for fear it would dirty his clothes. Kenny paid him 3*d.* The defendant never at any time paid him, nor did Sullivan.

Plaintiff's mother deposed as to his age; he had been acting as guide to the defendant's new carters before. Sullivan came to witness; he had come on previous occasions to engage plaintiff for similar work. Sullivan was defendant's yard foreman.

Cross-examined.—Sullivan asked witness to let him go. He was quite well fitted to go. The plaintiff was always paid himself.

A further witness deposed that he saw the accident. Kenny passed, leading his horse; he got into a rut in the water-table; the rut was 12 to 16 inches inside the water-table; the boy was thrown out. The hole or rut was plain to be seen. The wheel went over the boy's leg. It was ten minutes to 4 o'clock on the 10th January. It was between dark and light. The water-table was all right to drive on save for the rut.

At the conclusion of the plaintiff's case the learned Lord Justice directed the jury to find for the defendant, notwithstanding the requisition of the plaintiff's counsel, as follows:—"I submit that your Lordship should leave to the jury the questions: (*a*) was the plaintiff on the cart by the permission of the defendant? (*b*) was he on the cart on the invitation of the defendant? I submit that on the evidence it is open to the jury to find either that the plaintiff was assisting the driver with the sanction of the defendant, apart from employment, or as an employee of the driver with the assent of the defendant."

The plaintiff applied to the King's Bench Division for a new trial, which application was refused. Hence this appeal.

Serjeant Sullivan K.C. (and *E. J. Little* with him), for the appellant:—

The case should not have been withdrawn from the jury. The vital question as to the nature of the relationship existing between the plaintiff and defendant depended on questions of fact, not of law. There was at least some evidence of negligence on the part of the driver in guiding the cart into the rut, which was, on the evidence, clearly visible. It was also open to the jury to find that the driver was guilty of negligence in allowing the plaintiff to occupy a dangerous seat on the cart. There was evidence to support a finding of negligence on the part of the defendant—(*a*) in employing, by himself or his agent, a boy of such tender years upon such work; (*b*) in not giving the boy due warning and instruction as to the risks incidental to the employment; (*c*) in employing an inefficient and incompetent servant, whose neglect directly occasioned the injury. How can a case involving these questions of fact be withdrawn from the jury, whose province it is to determine them? It may be suggested that whether the plaintiff was an employee or a mere volunteer, the defendant is protected by the doctrine of common employment: *Degg* v. *The Midland Railway Co.* (1); *Potter* v. *Faulkner* (2). We contend, however, that that principle has no application to such a case as this, where the plaintiff was wholly incapable of appreciating the risks of the employment, and could not contract with the employer that he would undergo such risks. *Cooke* v. *Midland Great Western Railway of Ireland* (3) is an example of the distinction between adults and children in the application of principles of law. Where, as in the present case, we have to deal with what was, at most, a constructive employment, the youth of the plaintiff makes a vital distinction. In *Cleveland* v. *Spier* (4) it was held that a passer-by, who was casually appealed to by a workman for information respecting a thing which the latter was doing in a public thoroughfare, was not to be considered a "volunteer assistant," so as to exonerate the workman's master from responsibility for an injury resulting to the former from the workman's negligent mode of doing the work. *Brady* v. *Giles* (5) shows the necessity of such a case as this being left to the jury. See also *Jones* v. *Scullard* (6); *Simmons* v. *Heath Laundry Co.* (7). There was a duty on the defendant to give instructions to the plaintiff when employed on such work: *Cribb* v. *Kynoch, Ltd.* (8); *O'Byrne* v. *Burn* (9); *Young* v. *Hoffman Manufacturing Co., Ltd.* (10).

(1) 1 H. & N. 773.
(2) 1 B. & S. 800.
(3) [1909] A. C. 229.
(4) 16 C. B. N. S. 399.
(5) 1 Moody & Robinson, 494.
(6) [1898] 2 Q. B. 565.
(7) [1910] 1 K. B. 543.
(8) [1907] 2 K. B. 548.
(9) 16 D. 1025.
(10) [1907] 2 K. B. 646.

Appeal. 1919.

MURPHY *v.* ROSS.

G. FitzGibbon K.C., T. Sullivan K.C. (*Hungerford* with them), for the defendant :—

The case was rightly withdrawn from the jury. The only issue to which evidence was directed at the trial was the alleged negligence of the driver in guiding the cart into the rut, and the other matters of negligence alleged are not now open. No negligence of any kind was proved beyond the happening of the occurrence, which is at least equally consistent with the absence of negligence. The defendant owed the boy no duty; he did not employ him, or authorize his employment. The only payments suggested were gratuities given by the drivers to the boy. The furthest to which the case can be stretched is that the boy was engaged as a volunteer in a common task with the driver of the cart, and *Bass* v. *Hendon Urban District Council* (1) decides that in such a case the doctrine of common employment applies : *Potter* v. *Faulkner* (2). As to the alleged duty of giving warning to the boy, there is no evidence, and could be no evidence, that this was a dangerous occupation, because it was not. *Murphy* v. *Pollock* (3) establishes that the absence of reasonable care in the selection of a servant by a master cannot be inferred from a single act of incompetence or negligence on the part of the servant, and no more than that is suggested here, even assuming that the driver was guilty of negligence.

Serjeant Sullivan, in reply.

Cur. adv. vult.

Nov. 28.

SIR JAMES CAMPBELL C. :—

This is a serious and important case, not merely for the parties concerned, but also on account of the legal principles involved.

The facts so far as they were allowed to develop at the trial are briefly as follows :—

The defendant in this action is a carrier, carrying on business in the City of Cork, and employing a number of carters. Some of these carters when first engaged are not well acquainted with the thoroughfares of the city, and a man called Sullivan, who was employed by the defendant as yard foreman, was in the habit of securing boys with a knowledge of the city to act as guides for

(1) 28 T. L. R. 317. (2) 1 B. & S. 800. (3) 15 I. C. L. R. 224.

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these carters in the early days of their employment. Upon January 9th, 1918, Sullivan came to the house of a Mrs. Murphy, who lived near the premises of the defendant, and asked her to send her son Cornelius Francis Murphy, who was then aged ten years and eleven months, to attend on that day as a guide to a new carter, John Kenny, on his journey through the city. Mrs. Murphy having consented, sent the boy to the defendant's yard, where he was directed by Sullivan to accompany Kenny, which he did, being apparently occupied in this way for the greater part of the day, and receiving 3*d.* from Kenny in reward for his services. Upon the following day, January 10th, the boy returned to Kenny, and asked him did he require him again for that day, and Kenny having replied that he did, the boy accompanied him on his journeys to Messrs. Goulding's Artificial Manure Works. Upon the second journey the cart appears to have been fully laden with some chemical substance, and the boy, in order to avoid the soiling of his clothes, was either placed by Kenny or allowed by him to place himself on the edge of the side-boards of the cart—a position of obvious peril from which he would likely be dislodged by the most casual jolting of the cart. The cart was proceeding up a lane leading to Goulding's when Kenny, who was leading the horse, drew it more to the left-hand side, with the result that the near wheel passed into the water-table or depression in the road by which the rainfall is carried away. There was a rut or hole in this water-table plainly visible, some twelve to sixteen inches from the outer margin of the water-table, and the left wheel having dipped into this rut the boy was thrown from the cart, the left wheel passing over his leg and severely fracturing it. It was proved that Sullivan had on previous occasions employed the boy, with his mother's consent, for similar work, but that on no occasion had she or he ever received any remuneration from the defendant or Sullivan, and the evidence of the mother was that any money that was paid was always given to the boy himself.

At the close of the plaintiff's case, counsel for the defendant asked for and obtained a direction in favour of his client, but on what precise grounds is not very clear, and can only be gathered from the report of the Judge, who states that his impression from the evidence was that the rut or hole was dangerous, and such as

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a jury might find that a driver using reasonable care could have avoided, and that accordingly there was slight evidence of such negligence, and defendant's counsel made no suggestion to the contrary. I entertain no doubt that if, as the Judge states, this hole was dangerous, and if, as the evidence proves, it was plainly visible, these facts were evidence of negligence on the part of the carter in driving his vehicle into it, more especially when he knew, or ought to have known, of the perilous position of the boy; nor did counsel for the defendant contend to the contrary either here or in the Court below. Later on the Judge says that he could not see what duty the defendant owed the boy, even if he had allowed Kenny to employ the boy to conduct him for a remuneration to be paid by Kenny himself; and he adds that if the boy is to be treated as a servant of the defendant, then the doctrine of common employment would afford an answer to the action. From these observations it is plain that the grounds upon which the defendant's counsel based his requisition for a direction were the same as those that have been argued on his behalf on the hearing of this appeal, namely, that as there was no contractual relation between the boy and the defendant, the latter owed him no duty, either through himself or his servants, and in the alternative that if the boy is to be treated as working on the invitation of the defendant through his foreman Sullivan, his position was that of a volunteer or a workman, and that in either case his claim is defeated by the doctrine of common employment.

Now, in my opinion, the issue as to each of these propositions was one of fact, the question to be determined being whether the position of this boy was that of a mere volunteer, a fellow-workman, or an invitee; and, as the answer was one for the jury and not the Judge to give, it was impossible that the issue should be withdrawn from the jury at the close of the plaintiff's case, and, consequently, I hold that Serjeant Sullivan was right in asking as counsel for the plaintiff that the following questions should be submitted to the jury—(*a*) Was the plaintiff on the cart by the permission of the defendant? (*b*) Was he on the cart on the invitation of the defendant?

I shall now proceed to deal with the three propositions of the defendant's counsel, ignoring for this purpose the pleadings in the action, inasmuch as the Judge reports that at the hearing it was agreed that the plaintiff's pleading should, if necessary, be amended in such way as the plaintiff's advisers thought fit.

As to the proposition that the defendant owed no duty to the boy, in the absence of any contractual relation between them, I am of opinion that as a universal proposition it is unsound and contrary to our law, and that it is well established even in the case of an adult that when he voluntarily assists the master's servants in a service in which he has a common interest with the master, and by the invitation or with the acquiescence of the master or his servant acting within the scope of his employment, he is not a mere volunteer, and can recover if he is injured by the negligence of the master's servants. These words are an exact quotation from the judgment of Lord Reading C.J. in a recent important case, which, strange to say, was not cited in argument. I refer to *Hayward* v. *Drury Lane Theatre and Moss' Empires* (1), in which the facts were as follows: A revue was being rehearsed for the defendants at Drury Lane Theatre, and the plaintiff, a professional dancer, was requested by them to attend the rehearsals without payment, with the object on their part of testing her fitness for engagement, and on her part of obtaining an engagement, if she proved her fitness, to perform in the revue. She did attend the rehearsals, and was on the occasion in question ordered by a person in the employment of the defendants to stand on a staircase which was part of the scenery. She obeyed, but the staircase being insecurely fixed through the negligence of the same person, collapsed and crushed her ankle. The jury found—1, that she was not in the employment of the defendants; 2, that the defendants did not use reasonable care to prevent damage from unexpected danger on the stage of which they knew or ought to have known; and 3, that the injury was caused by the negligence of a person in the defendants' employment; and awarded £367 damages. An appeal by the defendants was unanimously dismissed by the Court of Appeal, consisting of Lord Reading C.J., Scrutton L.J., and Neville J., who delivered separate judgments, in which the authorities are elaborately reviewed and discussed; but the principle upon which each

(1) [1917] 2 K. B. 899.

judgment was based is to be found in the words I have quoted from Lord Reading C.J.

So far as the material inferences of fact in one case resemble those in another, it seems to me that this case is practically identical with the case before us, and that there was coercive evidence, first, that the boy was invited by the foreman to perform a service in which the employer was interested; second, that the foreman in giving this invitation was acting within the scope of his employment; and, third, that the boy volunteered to give the required service, and although there was no contractual relation in reference to it established between himself and the defendant, nor promise of remuneration by him, express or implied, yet that the object on the part of the defendant was to secure a competent guide for his carter, and on the part of the boy to secure employment and remuneration of some kind from the carter himself; so that each, both boy and defendant, had a common interest in the work to be performed. If I am right in this, the case was one clearly for the jury, and could not be withdrawn from them at the close of the case for the plaintiff. This would be sufficient to dispose of this appeal in favour of the plaintiff; but as the defence of common employment has been so strenuously urged on behalf of the defendant, I shall deal with it also. As I have pointed out, it has been relied upon as a defence to the plaintiff's claim on the alternative either that the boy was a mere volunteer or else a servant of the defendant, and that in either case the authorities decide that the boy must be taken to have by contract, express or implied, adopted the risk of injury from the negligence of his fellow-workers. I will assume, though many Judges have striven earnestly against it—and I have found no case in which it has been applied to a child of eleven—that even in the case of a child of such tender years this doctrine of common employment applies when he has either volunteered or contracted to engage in the particular work; but the simple answer upon the facts of this case is, first, that on the evidence he was not mere volunteer, but was, as in *Hayward's Case* (1), engaged on the invitation of the defendant's foreman, given in the scope of his employment, in a service in which he had a common interest with the defendant; and, second, that the evidence of the boy and his mother negatives the existence of any contract of service as between himself and the defendant, and consequently that it was not open to the Judge at the trial to non-suit the plaintiff on this issue of fact. Further, I am of opinion that even if the evidence for the plaintiff could reasonably be construed as establishing that the boy was either a mere volunteer or a workman under a contract of service with the defendant, the case could not be withdrawn from the jury, because in the circumstances of this case it lay upon the defendant to establish that either by himself or a delegate warning and instruction had been given to the child as to the dangers incidental to the work in which he was engaged; and that he exercised ordinary care to secure that the workmen with whom the boy was associated were reasonably competent. The very nature of the accident occurring on the second day of the carter's employment, coupled with his negligence in placing this boy or allowing him to place himself in a position upon the cart of such imminent peril, was at least some evidence of the carter's incompetence, and shifted to the defendant the onus of proof that he had exercised due care in selecting him.

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(1) [1917] 2 K. B. 899.

I hardly think it will be denied that in every case where the injured employee is a child of tender years, and is engaged in work in which he is exposed to danger, the defendant has to satisfy the jury that he has taken reasonable precautions to warn and instruct the child as to the nature and existence of this danger, and that it is not enough for him merely to establish by way of defence that the child was injured through the negligence of a fellow-workman. The authorities on this point will be found collected in *Cribb* v. *Kynoch, Ltd.* (1), where the law is elaborately discussed. In that case a young girl of fifteen was engaged to work at the gauging of cartridges in the factory of the defendants. The operation was explained to her by the forewoman of this particular department, who warned her that if the cartridge when placed in a bore in an iron block for the purpose of gauging, and after it had been gauged, got jammed in the block, so that she was unable to release it, she was to give it over to the fitter, but did not caution her as to the danger of striking the cap of the cartridge. The forewoman kept the girl under observation for some time while engaged with the work, and then left her, and a cartridge being jammed in the block, the girl, in order to loosen it, tapped the block against the iron base, and in this way struck the cap of the cartridge, which exploded, destroying her right eye. The County Court Judge found that the forewoman was negligent in not sufficiently warning the plaintiff of her danger, and awarded £300. His decision was reversed on appeal, and judgment entered for the defendants; but on the special ground that, while it is the duty of an employer to inform his workmen of the risks they incur in these particular employments, and of the danger incident to a disregard of the instructions given them, the duty may be delegated by the employer to persons competent to give the instructions; and if he has exercised due care in providing such persons, their neglect to give such instructions will not expose him to liability for injuries resulting to a workman from this neglect on the part of a fellow-workman engaged in a common employment. But while so deciding, Bray J., who delivered the judgment of the Court, was careful to state that it has been clearly established as a proposition of law that it is the duty of a master to warn young and inexperienced persons of any danger that existed in relation to the work in which they are engaged (pp. 553 and 558).

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(1) [1907] 2 K. B. 548.

This case of *Cribb* v. *Kynoch, Ltd.* (1), was approved and followed shortly afterwards in the case of *Young* v. *Hoffman Manufacturing Co., Ltd.* (2), in which the plaintiff, a boy of fifteen, had his arm injured by being caught in a circular saw while working in the defendants' engineering works. The jury found that there was negligence on the part of the defendants in not sufficiently instructing the plaintiff in the working of the machine, and that the foreman, to whom the duty of instructing the plaintiff was delegated by the defendants, had not fully instructed or cautioned the plaintiff. The defendants at the trial relied on the defence of common employment, but Ridley J. refused to allow this point to be taken, as it was not expressly raised in the pleading. Upon motion on behalf of the defendants for judgment or a new trial this point was not insisted upon on behalf of the plaintiff, but it was argued that no such defence was available as against an infant workman, and that in his case it is an implied term of the contract of service, or that at least there is a warranty, that proper instruction shall in fact be given, although in case of an adult workman the employer only contracts that he will employ competent persons, whose duty it shall be to give proper instruction. This latter contention was overruled by the Court of Appeal, Cozens-Hardy M.R. stating in his judgment (p. 651): "In my opinion the case must go down for a new trial. If it is established that a competent foreman was employed by the defendants whose duty it was, either by reason of express directions or by reason of directions implied from the nature of his employment, to give proper instruction, regard being had to the plaintiff's age and other circumstances, the defendants will not be liable for the omission of the foreman to give proper instruction. Unless this is established, the defendants will be liable, assuming that, as in the first trial, contributory negligence on the part of the boy is negatived." These concluding words are, in my opinion, conclusive to establish that in a case of the kind now before this Court a defendant is not entitled at the close of the plaintiff's case to a direction in his favour merely because, on the admitted facts, the injured infant was injured as the result of the negligence of a fellow-workman while engaged in a common employment, but that the defendant has still to satisfy a jury, either that he himself gave the necessary instructions and warning to the infant, or that a competent person was employed by him, whose duty either by express or implied direction it was to supply the instructions and warning; though he may have negligently failed to do so. In the same connexion Kennedy L.J. in his judgment (at p. 659) states: "Whether in the particular case such delegation, either express or implied, existed; whether the directions of the employer, if expressly given to the delegate, were sufficiently precise and explicit; whether the delegate was or was not competent to understand and to fulfil the delegated duty—all these, just as in a case where the employer gives instruction personally or by written or printed notice, the adequacy of such personal direction or of the notice, are matters proper for the consideration of the tribunal which, whether Judge or jury, has to decide the issue of fact upon which depends the question of the

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(1) [1907] 2 K. B. 548.

(2) [1907] 2 K. B. 646.

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fulfilment or non-fulfilment of the employer's duty to use reasonable care to avert danger to his servant employed about the machinery." He adds: "Ridley J., by his ruling in the present case, shut out the consideration of all such questions." So did O'Connor L.J. in this case by non-suiting the plaintiff. It was true that in the former case Ridley J. deprived the defendant of the opportunity of establishing a defence, of which the onus of proof lay on him, but it certainly is no less a miscarriage if the Judge at the trial by non-suiting a plaintiff at the close of his case affirms in favour of a defendant a defence to the action of which the onus of proof rests upon him, and has not been discharged. This point did not arise for decision in *Cribb* v. *Kynoch* (1), as it was tried by the County Court Judge without a jury, and the defence of common employment was supported by evidence, the findings of fact by the Judge taking the place of the findings of a jury. Consequently, the alternative of ordering a new trial, or entering judgment for the defendant, did not arise. In these cases the danger was incidental to the use of machinery, but the obligation to warn or instruct is not confined to such cases, and must be measured by all the attendant circumstances, and may be exacted in the case of children of tender years where it would not be required in the case of adults.

It is true that in the present case the work for which this child was engaged did not involve such obvious dangers as existed in *Cribb* v. *Kynoch* (1) and *Young* v. *Hoffman Manufacturing Company, Ltd.* (2), but the extreme youth of the injured boy, the nature of the work in which he was engaged, the fact that it was not carried on under the personal supervision of the defendant or his foreman, but under the supervision of casual or inexperienced carters, were all considerations upon which in my opinion a jury, if they thought fit, might reasonably conclude that the employer's duty of instruction and warning was not complied with in this particular case in the absence of personal direction, and that, in the absence of express direction to his foreman to give such instruction or warning, no implied direction should in the special circumstances be inferred; or they might well think that, inasmuch as the boy's work was carried out under the personal supervision of the carter and not of the employer or his foreman, the express direction to supply the necessary instructions and warning should have been given to them, and that in view of their subordinate position such a direction should not be implied. They might even in my opinion consider whether the employer should not have expressly prohibited his carters from allowing so young a lad to ride on their vehicles at all, when his work could apparently with equal efficiency and with comparative safety have been performed by walking along the footpath, or at least that they should have been prohibited from doing so in the circumstances of the present case, in which the vehicle was fully loaded in the particular way and the boy allowed to balance himself upon the edge of the sideboards, at the imminent peril of being thrown off by the most casual jolt. Had the boy been injured by being left by the carter during his temporary absence in charge of the horse and cart, a jury might reasonably find that both carter and boy should have been warned against anything of the kind and expressly forbidden to do it, and other illustrations of the same principle might readily be supplied. Further, I am of opinion, wholly apart from the question as to whether the defendant had by himself or by delegate satisfied his obligation to give this child instruction and warning, that there was some evidence in the nature of the accident itself of the incompetence of the driver sufficient to shift to the defendant the onus of proving that he used due care to ascertain that he was competent; and if the jury found, and could reasonably find upon the evidence, against him upon this issue, the defence of common employment must have failed. See the judgment of Palles C.B. in *Skerritt* v. *Scallan* (1). As to the judgments of Gibson J. and Dodd J. in the King's Bench division, they completely ignore the conclusion to which the evidence so directly leads that the boy was not a mere volunteer, but was present by express invitation, and was, in the language of Lord Reading C.J., assisting the master's servant, at the invitation of his foreman, in a service in which both boy and master were mutually interested. Indeed they seem to have completely forgotten or overlooked the evidence that the foreman, not only on this, but on former occasions had given this invitation to the boy, through his mother, for Gibson J. says : " There is no controversy as to the facts, and therefore no inference but one can be drawn—namely, that the plaintiff was got by the driver, who asked the plaintiff to accompany him and show him the way." It is true that the boy came back on the second day to know if the driver still required his services ; but if anything is clear in the case and not depending on inference, it is that the origin of his connexion with the driver was the invitation and introduction of the foreman, and that this invitation covered and embraced the entire period for which the carter would require the service of the boy. Later on he says : " It seems to me that the boy was in much the same relation to the defendant as that found in *Degg's Case*" (1), but the cardinal distinction is, as Lord Reading points out in *Hayward's Case* (2), to be found in the fact that in *Degg's Case* (1) the employer was wholly unaware of the volunteer's intervention. He concludes with these words : " The doctrine of common employment rules the plaintiff's remedy out as against the defendant. If the boy was an invitee, he was so only of the carter "; while Dodd J. summarily disposes of the case by this single sentence : " The ground of my decision is that the boy was in common employment with the carter, and that the ordinary rule of law applies." It seems clear to me that in the opinion of the learned Judges the boy was a mere volunteer, who implicitly agreed to take the risk of injury from the negligence of the defendant's servants, because it is impossible to believe that they came to the conclusion that he so agreed as the result of a contractual relation in fact between him and the defendant ; and the language at least of Gibson J. satisfies me that he would not have decided as he did were it not for his failure to appreciate the evidence as to the customary invitation extended to the boy by the defendant's foreman in reference to a service in which both boy and defendant had a common interest. Their decision must be reversed, and the case sent down for a new trial, the costs of the abortive trial to abide the result, but the plaintiff is entitled to the costs of the new trial motion both here and in the Court below.

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(1) [1907] 2 K. B. 548.

(2) [1907] 2 K. B. 646.

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(1) 11 I. R. C. L. 389.

(1) 1 H. & N. 773.

(2) [1917] 2 K. B. 899.

O'Connor M.R.:—

I shall state the facts shortly as they were proved. The defendant carries on business in the City of Cork, and his business involves the carting of material to places in and about the city. Whenever he engaged a new carter who was unacquainted with the city and its surroundings it was the habit of the defendant's foreman to procure for the carter the guidance of some small boy who lived in the neighbourhood. The day before the accident occurred a new carter had been taken into the defendant's service, and the yard foreman went to the mother of the plaintiff, a little boy then aged eleven years, who lived near by, and asked her to allow the boy to accompany the carter on his journey. The mother assented, and the plaintiff went. He got 3*d.* from the carter. On the next day the plaintiff again went out with the carter, whose duty was to deliver a load of some stuff at Goulding's manure works. The plaintiff was to show the way. He could have done this on foot; but, whether it was that he wanted to avoid a tiresome walk or get a joy ride, he got up on the cart, and, as it was loaded with some noisome stuff on which he could not sit, he sat high up on the ledge of the cart. The carter led the horse, and so guided the cart that one of the wheels got into a rut, which caused a jolt whereby the boy was thrown off the cart and sustained the injury complained of.

The evidence was directed to proof of negligence on the part of the carter in the guidance of the cart. It was admitted that there was evidence of negligence, but the case was withdrawn from the jury on the ground that even though the carter was guilty of negligence, the defendant was not liable in any aspect of the case. The learned Judge presented two views: one, that the boy was in the employment of the carter; the other, that he was in the employment of the defendant. In the first case the learned Judge was of opinion that the defendant owed no duty to the plaintiff. In the second case he was of opinion that the doctrine of common employment afforded a complete defence. I shall deal with these two defences separately.

Did the defendant owe any duty to the plaintiff, and can he be held responsible for the negligent breach of that duty by his servant? As the case was withdrawn from the jury, I am bound to treat the boy as a child of tender years, not very well able to take care of himself. I say that I am so bound because that is a matter for the consideration of a jury.

Now, I propose to test the liability of the defendant for the negligence of his servant in the following way:—Suppose for a moment that children were to the knowledge of the defendant's servant in the habit of frequenting the defendant's yard, where horses with carts were standing; that these children amused themselves by getting into dangerous positions, some climbing up on the carts, while others played with the horses, and that one of them was so injured. It is quite clear that the defendant would be liable, even though the children were trespassers: *Cooke* v. *Midland Great Western Railway Co.* (1). That being so, could it be said that if one of these children, on the invitation of one of the defendant's servants, placed himself in an insecure position on a cart about to start on a journey, and as a result got injured on the way, the defendant would not be liable? Surely, if a duty is owing to a child who is a mere trespasser to drive him away from a dangerous position, there is a still greater duty owing to a child who, when doing something by request, exposes himself to danger. In my opinion any other conclusion would be irrational.

In this case a boy of eleven—a mere child—is expressly invited by the defendant's foreman to assist one of the defendant's servants in the performance of a duty. The servant, while utilizing the boy, allows him to take up a most dangerous position on the cart, a position from which he might be thrown by any mishap—a collision, a shy of the horse, a jolt caused by a rut or a stone. The boy is thrown by a jolt. The evidence of negligence is there; and it would be against all sense of right if there was no responsibility on the part of the servants and employer to the boy, when an act of negligence causing an accident to any member of the public would make the employer liable. This, in my opinion, is not the law. There is a duty owing to children of tender years which overrides, if not all, at least some well-established legal principles. Volenti non fit injuria does not apply to children even when they are trespassing, if the trespasses are committed with the knowledge of the property-owner, when any prudent owner would take steps to prevent them. This has been established by *Cooke* v. *The Midland Great Western Railway Co.* (1).

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(1) [1909] A. C. 229.

But it is said that the boy was in common employment with the defendant's servant, and that this affords a defence to the action. Now, in the first place, the evidence of the plaintiff by no means proves common employment. The fact that the boy was paid the modest sum of 3*d.* by the carter—and, in the absence of other evidence, this payment came from the carter's private pocket—is strong evidence that the boy was acting for the carter and not for his employer. But the defence of common employment is one for the defendant to prove. The onus is on him, and he must discharge it. He did not discharge it in the present case.

Is the defence of common employment applicable to a child of tender years employed in the very special circumstances of the present case? The principle underlying the doctrine of common employment is a contract by the servant with the master to bear the risks arising from the possible negligence of a fellow-servant who has been selected with due care by the master. For this I need only refer to the judgments of Lord Herschell and Lord Watson in the House of Lords in *Johnson v. Lindsay* (2), and I am not aware that the statement therein of the law of common employment has been upset by any later House of Lords' decision. This then being the law, I do not see how it can govern the case of a child of tender years incapable of estimating the risk attending his employment. There are no doubt some decisions in which observations have been made by learned Judges which may seem in conflict with this view, but I think it will be seen that they must be confined to the common cases of master and servant, and ought not to be extended to the special case in which the servant is a child of tender years, unfit to enter into any contract deserving consideration.

Thus in *Cribb* v. *Kynoch* (3) the plaintiff was a girl of fifteen years, who brought an action against her employers for injury caused by the neglect of a forewoman to give her proper

(1) [1909] A. C. 229. (2) [1891] App. Cas. 371. (3) [1907] 2 K. B. 548.

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instructions in handling dangerous articles. The defence was common employment. The main question argued was whether the defendants were entitled to delegate to the plaintiff's fellow-servant the duty of instructing her, which was decided in the defendants' favour; but another point was made for the plaintiff, viz., that, being a child, she could not have contemplated the risk, and therefore could not have undertaken to run it—in other words, that she did not come within the principle on which the defence of common employment is founded. This point was discussed by Bray J., who delivered the judgment of the Court of Appeal in the following words: "Another point was that this plaintiff, being a child, could not have contemplated the risk, and therefore could not have undertaken to run it; but it appears from Lord Cairns' judgment that that is only given as the reason for the rule, not the rule itself. The rule is that the master as between him and his servant has not agreed to be responsible for the negligence of a fellow-servant. If it had to be shown in every case that the servant contemplated the particular risk, a new limitation would be introduced to the rule, for which there is no authority." This is, no doubt, very true, and no objection can be taken to the observations of the learned Judge when applied to the particular case, which was one of ordinary employment under a contract of service beneficial to the infant, and for which it was not alleged she was unfit because she was of tender years. But once the element of tender years is introduced the observations do not apply, because it then becomes a case in which the servant not merely did not, but could not, have contemplated the risk. The learned Judge distinguished between the reason for the rule of law and the rule itself, referring to the judgment of Lord Cairns in *Wilson* v. *Merry* (1); but once the reason—the contemplated risk—disappears, as it must disappear in the case of a child of tender years, the rule must disappear also. As I said before, I treat the present case as that of a child of tender years, because the jury might have found that he was so young that he was unaware of any risk. A similar point came up for decision in *Young* v. *Hoffman Manufacturing Company, Ltd.* (2). The plaintiff was a boy of fifteen years, who was injured through his arm being caught by a circular saw while working in the defendants' engineering works. The jury found that there was negligence on the part of a foreman who did not give the plaintiff proper instructions. The defence of common employment was the main subject of the judgment of the Court of Appeal. As in *Cribb* v. *Kynoch* (1), it was argued for the plaintiff that the defence was not good against an infant. Cozens-Hardy M.R. deals with the point in this way, and says: "In my opinion there is no justification for the distinction sought to be drawn between an adult workman and an infant workman." Later on he says: "That the nature of the contract varies according to the age of the workman is an impossible suggestion" . . . And later: "It was argued that the whole doctrine rests upon the theory or assumption that the workman contemplates risks from the negligence of his fellow-workman, and agrees that his master shall not be liable for such negligence, and that an infant cannot thus agree. I cannot assent to this view. A contract of service is regarded as beneficial to an infant; and it is no objection that the contract contains stipulations and provisions usual in the particular trade, and such as a master may reasonably impose as a protection to himself: *Leslie* v. *Fitzpatrick* (2). There can be no legal difficulty in implying as one of the terms of the contract a stipulation which, if the contract were expressed in writing, would be free from objection. In other words, an infant can enter into a contract of service upon the usual reasonable terms upon which alone the master will employ him." It will be observed that the learned Master of the Rolls was only dealing with the mere fact of infancy being inconsistent with any contract. Sir Gorell Barnes was equally emphatic on the point, but says (at page 654):—"In general a contract of service is for the benefit of an infant, and he can bind himself as an apprentice or enter into a contract of service, though there are cases where the contract is so manifestly to the disadvantage of the infant that he could not be bound by it. If, however, the terms of the contract are of the common kind, and such as the master might reasonably impose for his own protection, and the wages are fair, there seems no reason for implying terms different in kind in the case of the infant from those implied in the contract of the adult."

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(1) L. R. 1 H. L. Sc. 326.

(2) [1907] 2 K. B. 646.

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(1) [1907] 2 K. B. 548.

(2) 3 Q. B. D. 229.

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Therefore it is established that infancy in itself—that is, being under twenty-one years—affords no protection against the defence of common employment; but I do not think that these decisions can be pushed farther. It cannot be said that the judgments would have been the same if it had been found that the plaintiff was a child of such tender years as to be incapable of estimating or even contemplating a risk. It is further to be observed that Cozens-Hardy M. R. found that the contract of service was beneficial to the infant, and that it was no objection to it that it contained stipulations usual in the particular trade, while Sir Gorell Barnes seems to apply his judgment only to contracts of the common kind, and where the wages are fair.

Now, it cannot be said that there was any contract in this case beneficial to the infant, nor can it be said that it was a usual contract of service, carrying with it the usual stipulations. I therefore think that the plaintiff's case does not come within the scope of the judgments in *Cribb* v. *Kynoch* (1) and *Young* v. *Hoffman Manufacturing Company, Ltd.* (2); and I know of no case where the defence of common employment was held good against a child of tender years—so young as eleven years. In truth, there was, on the facts proved, no contract of service at all. The assistance given by the boy was really only a voluntary courtesy, rewarded by a small honorarium, or at least the expectation of one. To extend the doctrine of common employment to such a case as this seems to me to be riding it to death, and I do not think that it is a doctrine that bears or deserves extension. There is a trenchant criticism upon it by Neville J. in *Hayward* v. *Drury Lane Theatre* (3): "The doctrine of common employment appears to me to be a purely arbitrary and artificial rule founded upon neither principle nor (prior to 1837, according to Lord Watson), authority—a mere excrescence upon the common law, devised apparently for the purpose of exempting a particular class from an otherwise universal liability." This doctrine ought, in my opinion, be confined within proper limits. There is quite sufficient scope for its application within the ordinary business of commercial undertakings. To apply it to the case of a mere child asked to do a casual service would mean the disregard of the principle on which, notwithstanding Neville J.'s observation, I believe the doctrine is founded.

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(1) [1907] 2 K. B. 548.

(2) [1907] 2 K. B. 646.

(3) [1917] 2 K. B. 899, at p. 915.

In my opinion the evidence given at the trial raised questions which ought to have been left to the jury, and I agree with the judgment of the Lord Chancellor that there ought to be a new trial.

Ronan L.J.:—

I regret that I am unable to agree with my colleagues in this case.

In the course of the appeal we have listened to certain legal arguments on behalf of the appellant, which, in my opinion, are not covered by the notice of motion for a new trial. That notice is in the following terms: it asks for an order for a new trial of the action "upon the grounds that there was legal evidence proper to be submitted to the jury, that the defendant was under an obligation to the plaintiff to use due care in the driving, leading, and management of the defendant's horsed vehicle so as to avoid causing injury to the plaintiff, and that the defendant's servant, by omitting to use such care, had negligently driven and led the said vehicle into a dangerous hole, thereby causing the loss of plaintiff's limb."

I think that the evidence given in the case clearly shows that it was to this issue of negligence, and to this issue alone, that attention was directed at the trial; there is no other negligence suggested in the evidence, and this is the more remarkable because the particulars of the alleged negligence are very carefully drawn, and these particulars include, not only the negligence relied upon in the notice of motion for a new trial, but the alleged negligence of the defendant's servant in allowing the plaintiff to occupy the particular seat on the cart which, it is said, he did occupy, and the alleged negligence of the defendant in employing a boy of such tender years as the plaintiff.

I shall deal shortly with the evidence for the purpose of seeing how far it supports these charges of negligence; but first let me say this as to the nature of the boy's employment. Serjeant

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Sullivan suggested during the argument that the present case was analogous to that of a man driving a horse and cart, and saying to a passer-by, Will you tell me the way to such and such a place? Serjeant Sullivan has, however, himself cited a case which decides that a casual demand of that nature does not render the person to whom it is addressed a fellow-servant of the other.

The plaintiff's evidence is this. He says:—"Sullivan [the foreman] came to my house. I went to Ross's yard. I was directed by Sullivan to accompany John Kenny round the city." Serjeant Sullivan remarked that each little child would only know his own district, and it was necessary for the foreman to get a different boy for each district; and he drew a picture of the immaturity and helplessness of the plaintiff, who only knew his own neighbourhood; but here we find the order was to accompany Kenny "round the city" generally. It then appears that he had been engaged on this work for about two months on and off.

Next, as to the position of the boy upon the cart. He says (I take the evidence from the Judge's report):—"I was sitting on left-hand side of the cart, on the side of the cart itself. Cart was loaded with soft stuff. I was sitting on the cart on each occasion. I did not sit on load for fear it would dirty my clothes." That is the entire of the evidence as to the boy's position on the cart. There is no other evidence of the alleged negligence "in allowing the plaintiff to occupy the seat." We know nothing as to what the cart was like. I am unable in the present case to find any evidence that the position the boy occupied on the cart was a dangerous one, or that he was sitting "on the edge of the side-boards of the cart, a position of obvious peril," or "high up on the ledge of the cart." It is equally consistent with the evidence that the cart was an ordinary flat cart without ledges. He was sitting on the side of the cart, that is all; he would not sit on the contents of the cart for fear his clothes should be soiled. I am unable to say that allowing the boy to occupy the position he did constitutes any evidence of negligence, or that the evidence is not perfectly consistent with the absence of negligence.

As to the alleged negligence in managing and guiding the horse and vehicle, I shall assume (but not decide) that there was evidence of this negligence.

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The general principle as to the burden of proof of negligence is stated in the judgment of Willes J., in *Smith* v. *Great Eastern Railway Co.* (1): "It is not enough to show that damage may have occurred through the negligence of the defendants' servants . . . The plaintiff must show something which the defendants might have done, and which they omitted to do, before they can be held responsible for the misfortune which has happened." Again, in *Lovegrove* v. *London, Brighton, and South Coast Railway Co.* (2), Willes J. said: "It is not enough for the plaintiff to show that he has sustained an injury under circumstances which may lead to a suspicion, or even a fair inference, that there may have been negligence on the part of the defendants; but he must go on and give evidence of some specific act of negligence on the part of the person against whom he seeks compensation." These cases establish the burden of proof which the plaintiff has to sustain.

As to the suggested negligence of the defendant in employing an incompetent servant—assuming that the servant was in fact guilty of negligence—and the suggested negligence of the defendant in not giving due warning to the plaintiff of the danger it is said he incurred, there is one proposition settled beyond all doubt; and that is that when the plaintiff avers negligence, whether it be negligence in the employment of an incompetent servant, or negligence in not giving due warning of the danger incurred, the burden of proof is on the plaintiff. In *Lovegrove's Case* (2), to which I have already referred, Willes J. said (at p. 692): "Then is the burden of proof of the workman's competency cast upon the master? I apprehend not. There is nothing to differentiate this from ordinary cases." And he continues in the words which I have already quoted. In *Murphy* v. *Pollock* (3) the Court of Exchequer was evenly divided on the question, whether, if the inference of a want of ordinary skill and care on the part of a servant could be drawn from a single act of negligence on his part, evidence of that single act would sustain an action for negligence based on the master's alleged want of reasonable care in selecting the servant. FitzGerald and Hughes BB. thought that it would not; Deasy B. and Pigot C.B. thought

(1) L. R. 2 C. P. 4, at p. 10.
(2) 16 C. B. N. S. 669, at p. 692.
(3) 15 I. C. L. R. 224.

that it would. In the Exchequer Chamber the Court unanimously decided in accordance with the view of FitzGerald and Hughes BB. This is an authority binding on this Court, and, in my opinion, it is conclusive on this point. I again quote from the judgment of Willes J. in *Lovegrove's Case* (1), at p. 691: "Now, was there any evidence that the company did employ an incompetent person? The only evidence was one act of negligence committed by that person: he once omitted to use due and proper care in doing the work entrusted to him. If that (which I venture to doubt) is evidence of incompetency, it certainly was not evidence that the company knowingly employed an incompetent workman." So in the present case the one act of suggested negligence on the part of the driver was subsequent to the employment; it would only have come to the knowledge of the employer after the occurrence. How can evidence of that amount to evidence of negligence on the part of the employer in selecting an incompetent servant? I respectfully agree with the view adopted by Willes J. in *Lovegrove's Case* (1), and by FitzGerald and Hughes BB. in the Exchequer Chamber in *Murphy* v. *Pollock* (2), namely, that evidence of one single act of negligence on the part of a servant or workman does not sustain a charge of negligence against the master in employing an incompetent servant. As to the alleged failure to give proper warning to the plaintiff, the first suggestion of this particular negligence on the part of the defendant was, I think, made on the hearing of this appeal.

I wish to point out the obvious distinction between a particular employment which may be inherently dangerous and one which, prima facie at all events, involves no danger of any kind or description. To apply principles applicable to the case of the employment of a person of tender years in loading cartridges, or working that most dangerous instrument, a circular saw, or other work of that nature, to an employment such as the plaintiff was engaged in here, the directing on his way the driver of a horse and cart, is, to my mind, far-fetched, and, indeed, Serjeant Sullivan did not press his argument as to this very seriously.

The argument on this part of the case was mainly founded on *Cribb* v. *Kynoch, Ltd.* (3). In that case it was proved that the forewoman, Miss Bass, did not warn the plaintiff, a girl of fifteen, of the danger that might follow from striking the cap of the cartridge. The girl did so, and it exploded. What warning should have been given here? "Take care you are not jolted off"; or, "Take care to sit tight." In the first place, there is no evidence that the boy was not so warned. The burden of proof of the negligence in omitting to warn plainly lies on the plaintiff. The strong probability is that when he began at this work he got some such warning as I have suggested. In the next place, whose duty was it to give the warning if it was necessary? *Cribb* v. *Kynoch, Ltd.* (1), decides that it was the personal duty not of the employer, but of the forewoman. Here it was the duty of the foreman who engaged the boy. Even assuming that the boy had got into "a position of obvious peril" on the cart, it would have been the duty of the carter. But *Cribb* v. *Kynoch, Ltd.* (1), also decides that failure to warn by the servant who ought to have done so is simply negligence of a fellow-servant, for which the employer is not responsible.

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(1) 16 C. B. N. S. 669. (2) 15 I. C. L. R. 224. (3) [1907] 2 K. B. 548.

On this branch of the case I am of opinion that the employment was not a dangerous employment within the principle of *Cribb* v. *Kynoch, Ltd.* (1); that there is no evidence of failure to warn; that even if warning was necessary, and the omission was proved, it was simply a case of negligence of a fellow-servant. I am further of opinion that there is no evidence that the foreman was unfit for his duties, or of any personal negligence by defendant, either in the employment of his servants, or in his directions to them. In my judgment, accordingly, there was no evidence fit to be submitted to a jury that the defendant was guilty of negligence either in the matter of employing an incompetent servant or in not giving due warning to the plaintiff.

I now come to the further question which has been argued on this appeal: Could a child of such tender years as the plaintiff contract to undertake such risks incidental to his employment as might be occasioned by the acts of his fellow-servants? The boy had been employed on and off for two months at this work. The only direct evidence as to his fitness for it is that of the

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(1) [1907] 2 K. B. 548.

The jurisdiction of the Justices under sect. 24 is the same whether they are appointed by the rules or not, except that if they are not, their jurisdiction only arises on default of the arbitrators. The jurisdiction is directly given in this latter case by the Act, and there is no clause in sect. 24 corresponding to that in sect. 23, that the decision is without appeal. And even if the words in sect. 22, "shall be binding and conclusive," exclude an appeal, these words would not apply to them, as they were not appointed by the rules in this latter case. This Act is remarkable in its distinction between "arbitrators" and Justices when appointed as the tribunal by the rules. This distinction entirely disappears in the subsequent Acts, and the Courts have held that when the rules prescribe Justices: *Callaghan* v. *Dolwin* (1); or the County Court: *Wilkinson* v. *Jagger* (2), as the tribunal to settle disputes, they are to be regarded as arbitrators. This Act was repealed by the Consolidation Act of 1855 (18 & 19 Vict. c. 63), and as this is the Act on which the important case of *Callaghan* v. *Dolwin* (1) was decided, it must be carefully examined and compared with the former Act. In sect. 40 it will be seen that it provides that in all cases the decision of the tribunal appointed by the rules shall be without appeal. The proviso is that where the rules of an existing society prescribe Justices, the dispute shall be settled by the County Court "as hereinafter mentioned."

Now the County Court had no jurisdiction under these rules. Under the proviso it gets its jurisdiction direct from the statute, as the justices did in the latter case under the preceding Act of 1850. But here we have in sect. 41 the express provision, "The decision of such County Court upon and in relation to such application as aforesaid shall not be subject to any appeal"—the clause omitted in sect. 24 of the Act of 1850. This was necessary, as the jurisdiction was given directly by the statute, not by the rules, and therefore to the Court qua Court. Sect. 41 gives a general jurisdiction in certain cases, and in certain events, to the County Court as such, in addition to that conferred by the proviso, but it is clear that the express clause against appeal applies to this jurisdiction under the proviso also. This Act gave no independent jurisdiction to the Justices as such, as the Act of

(1) L. R. 4 C. P. 288, at p. 294.

(2) 20 Q. B. D. 423.

That is a very specific statement; the doctrine of common employment is a rule of positive law, although based on a fiction. In *Cribb* v. *Kynoch, Ltd.* (1), Bray J. quotes from Lord Blackburn's (then Blackburn J.) judgment in *Howells* v. *Landore Siemens Steel Co.* (2): "It is a rule of law that the master who employs a servant (not an agent) is responsible for the negligence of that servant in matters in which he is employed; but there is this exception, which has been established by a series of decisions, that with regard to a fellow-servant the master is held not so responsible; because this negligence is to be taken as one of the ordinary risks which the servant contemplates and undertakes when entering into his employment." This statement of the law, Bray J. says, was approved of by Lord Watson in *Johnson* v. *Lindsay* (3). Bray J. further says at p. 562: "Another point was that this plaintiff, being a child, could not have contemplated the risk, and therefore could not have undertaken to run it; but it appears from Lord Cairns' judgment [*Wilson* v. *Merry*] (4) that that is only given as the reason for the rule, not the rule itself. The rule is that the master as between him and his servant has not agreed to be responsible for the negligence of a fellow-servant. If it had to be shown in every case that the servant contemplated the particular risk, a new limitation would be introduced to the rule, for which there is no authority." For my part, therefore, I disregard the argument based on the fact of the plaintiff being a child of tender years, and therefore incapable of entering into this fictitious contract. We have to deal with a positive rule of law, namely, that the master is not responsible for an injury occasioned to his servant by the act of his fellow-servant.

Was the plaintiff a servant of the defendant? The statement of claim alleges that "on or about the 10th January, 1918, the servants of the defendant, in course of the defendant's business, and with the connivance, assent, knowledge, and permission of the defendant to so engage boys of the plaintiff's tender years, engaged the plaintiff for hire to accompany a horse and cart of the defendant and the servant of the defendant in charge thereof for the purpose that the plaintiff should act as a guide to the said servant, who was at the time a stranger to the City of Cork." That is the way the plaintiff's case is presented in his pleading, and what he set out to prove. The evidence as to this as it appears from the Judge's report is as follows:—

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(1) [1907] 2 K. B. 548, at p. 559.

(2) L. R. 10 Q. B. 62.

(3) [1891] A. C. 371, at p. 387.

(4) L. R. H. of L. Sc.

1. The boy: "Day before accident Sullivan [yard foreman] came to my house. I went to Ross. I was directed by Sullivan to accompany John Kenny round the city. Sullivan had asked my mother, and had given me directions. Spent that day with Kenny going round city. I got *3d.* from Kenny. I went back to Kenny the following day."

Cross-examined: "I had gone on carts before. I was often employed by Sullivan before to go round; the first time, a couple of months before accident." . . . "Kenny paid me the *3d.* Ross never at any time paid me, nor did Sullivan."

2. The mother: "He had been acting as guide to Ross's new carters before. Sullivan came to me; he had come on previous occasions to engage him for similar work."

Cross-examined: "Sullivan asked me to let him go. He was quite well fitted to go."

Re-examined: "The lad was always paid himself."

This is the entire evidence as to the boy's employment. It seems to me absolutely clear, unambiguous, and uncontradicted. He was employed by the defendant's foreman, and paid by the defendant's carter for his work. There is no suggestion in the evidence that he ever worked for a day or part of a day without being paid for it.

I confess I cannot understand the suggestion that when the mother said "he was always paid" she meant he was not always paid. The contract was made with the defendant's foreman, who directed the boy what he was to do. The payment was made by the carter, with whom he was working, at the close of the day. There is no evidence as to whether the carter was allowed the amount in addition to his wages, or whether he had to pay it out of his wages, as it was rendered necessary by his ignorance of the locality. This seems to me quite immaterial, as the contract of employment and the directions to the servant were made and given by the foreman, acting on behalf of the employer. If the carter had for the first time picked the boy up and made the arrangement with him, and the foreman had nothing to do with the contract or the boy, different questions would arise as to the defendant's liability.

If I am right in this, it disposes of the case, as it makes plaintiff clearly the fellow-servant of the carter in the strict sense of the word, and I rest my judgment on this ground. The question of common interest has no application where the plaintiff is the servant of the defendant.

Assuming, however, that the plaintiff was not paid for what he did, does that make any difference in point of law? The decision in *Bass* v. *Hendon Urban District Council* (1), following *Potter* v. *Faulkner* (2), appears to me to answer this question. There the plaintiff, a boy of fourteen years, had been invited by the defendants' firemen to assist, along with other boys, in dragging home the defendants' fire escape, and was injured in doing so. It was held by the Court of Appeal that the doctrine of common employment applied, and that the defendants were entitled to judgment. Vaughan-Williams L.J. said that "the findings and the evidence showed a strong case for saying that the plaintiff, and the other boys who were with him, were volunteers to assist those who had the management of the fire escape, and that they were in the same position for the purposes of this case as if they had been servants of the defendants in receipt of wages."

The class of cases which has been referred to, where the plaintiff is engaged in a transaction of common interest to both parties, appears to me to have no application here. The plaintiff, to my mind, had no interest in the bringing of the stuff in the cart to Goulding's works. He had the hope of being paid for what he was doing. He had no other interest in the matter. His interest was the same as that of the carter. If the plaintiff had been applying to Ross for employment, and Ross had asked him to let him see and test his capacity, and for this purpose plaintiff undertook to act as guide on trial, the case of *Hayward* v. *Drury Lane Theatre, Ltd., and Moss Empires, Ltd.* (3), might apply; but, in my opinion, it has no application to the facts of this case.

For these reasons I am of opinion that O'Connor L.J. was right in withdrawing the case from the jury.

Solicitors for the appellant: *Hackett & Hawkesworth.*

Solicitors for the respondent: *Babington, Clarke, & Mooney.*

R. ST. J. C.

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(1) 28 T. L. R. 317. (2) 1 B. & S. 800. (3) [1917] 2 K. B. 899.

K. B. Div.
(Crown Side)
1920.

Jan. 13, 14.

R. (THOMAS CAHILL) *v.* JUSTICES OF DUBLIN COUNTY (1).

Certiorari to quash conviction—Essentials of justice—No evidence to support the particular charge—Alleged admission by defendant.

On a summons for making use of abusive and threatening language, the complainant was unable to prove the date of the occurrence, but the magistrates who tried the case convicted the defendant on an admission alleged to have been made by him to the effect that he was, on a later date than that mentioned in the summons, in the place where the occurrence was alleged to have taken place.

Held, that it was not competent for the complainant to rely on this alleged admission of the defendant, that the conviction was in disregard of the interests of justice, and that therefore a writ of certiorari to quash the conviction should be granted.

CERTIORARI.

Application for an order for a writ of certiorari directed to the Justices of the County Dublin for the purpose of bringing up to be quashed an order made at Tallaght, County Dublin, Petty Sessions on 6th October, 1919, whereby the said Thomas Cahill was directed to enter into a recognizance to keep the peace towards all His Majesty's subjects, and particularly towards John Lambert (the complainant), for a period of six months, himself in the sum of £20 and two sureties in the sum of £10 each, and, in default of entering into such recognizance within seven days, to be imprisoned in Mountjoy Gaol for a period of one calendar month.

The facts appear sufficiently from the judgment.

H. J. Moloney, for the prosecutor:—

The conviction was in disregard of the interests of justice, for the defendant was convicted of an offence alleged to have been committed on a day not charged in the summons: further, he was convicted on an admission alleged to have been made by him at the hearing, and he was allowed no opportunity of explanation or defence. This should not have been admitted in evidence, and without it there was no evidence to support the charge. [He referred to *R.* (*Garvey*) v. *Armagh Justices* (1) and *R.* (*Redmond*) v. *Jellett* (2).

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(1) Before MOLONY C.J., and GIBSON and SAMUELS JJ.

K. B. Div.
(*Crown Side*)
1920.
R.
(Cahill)
v.
Justices of
Dublin Co.

Holmes, for the justices:—

The defendant's admission was admissible in evidence, and the summons was therefore sustainable. The conviction was in the interests of justice, and therefore good: *Ex parte Davis* (3).

Molony C.J.:—

On the 27th September, 1919, a summons was issued at the instance of John Lambert, as complainant, against Thomas Cahill, the applicant herein, in which it was complained that the defendant, at Glenasmole, on the 14th August, 1919, did unlawfully make use of abusive and threatening language towards the complainant, and he was required to attend at the hearing of the complaint at Tallaght Petty Sessions on the 6th October and show cause why he should not be bound over in solvent sureties to keep the peace and be of good behaviour towards His Majesty and all his subjects.

The case was accordingly heard on the day named, and the defendant was ordered to enter into a recognizance to keep the peace for a period of six months, himself in the sum of £20, and two sureties in the sum of £10 each, and, in default of entering into such recognizance, to be imprisoned in Mountjoy Gaol for a period of one calendar month unless such recognizance be sooner entered into.

This application is brought for the purpose of quashing the said order, which it is alleged was made (*a*) in disregard of the essentials of justice, and (*b*) without evidence to support it. As regards (*a*), it has been contended that there was no proof applicable to the complaint, which was in respect of misconduct on the 14th August, 1919, and that the Justices acted on misconduct alleged to have been committed on a later date which was not charged in the summons.

As was stated by Lord O'Brien in *The King* (*Martin*) v. *Mahony* (4):—"In all matters of procedure the essentials of justice must be observed. It is one of the essential requirements let the case go no further. But then the question arose, suppose the rules are silent as to provision for a tribunal? The statute supplied the omission; for by sub-section 6, in that case it enables the member or person aggrieved to apply to the County Court or to a Court of summary jurisdiction, at his option, to settle the dispute. In this case, no tribunal having been agreed on, the parties are left to the decision of a Court of law, strictly so called, and there is clearly such an appeal from the decision of the County Court, or Court of summary jurisdiction, as the statutes give in reference to these tribunals respectively.

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(1) [1918] 2 I. R. 94.

(2) [1919] 2 I. R. 79.

(3) 24 L. T. (N.S.)

(4) [1910] 2 I. R. 695.

So far as collecting societies are concerned, the Legislature saw possibilities of injustice being done if the provisions I have mentioned were not supplemented. It might happen that the rules of a society would provide for a tribunal whose members might be supposed to be biassed rather in favour of the society than of an aggrieved member; and accordingly it provides by sect. 7 of the Collecting Societies and Industrial Assurance Companies Act, 1896, that a member, notwithstanding any provisions of the rules of the society to the contrary, may apply to the County Court or a Court of summary jurisdiction for the settlement of disputes. In my opinion here, also, we have a statutory right of recourse to a Court of law, strictly, with all its incidents, including the right of appeal.

Mr. O'Byrne argues that the words "notwithstanding any provisions of the rules of the society or company to the contrary" confine the operation of sect. 7 to cases in which the rules either contain no provision for submission of the dispute to a Court of summary jurisdiction, or contain provisions inconsistent with such submission. I cannot accept that contention, which involves, to my mind, a straining of the language of the statute. The section is perfectly general in its terms, and, I think, general in its application. Further, the words "notwithstanding any provisions of the rules of the society or company to the contrary" are an express prohibition of any attempt, by rule, to contract out of the statutory right conferred by sect. 7. This statutory right is one of recourse to a Court of law, with its incident of appeal. Consequently, any attempt to restrict or qualify the statutory right is within the prohibition, and, therefore, I hold

GEORGE S. WORTHINGTON, Applicant; The COUNTY COUNCIL of the COUNTY of TIPPERARY (South Riding) and the GORTNAHOE RURAL DISTRICT COUNCIL (otherwise Urlingford No. 2 R. D. C.), Respondents (1).

Appeal.
1920.
Feb. 2, 3, 27.

Malicious injury — Bailee's right to compensation — "Person injured" — Punitive damages—Costs of Appeal—Grand Jury (Ireland) Act, 1836 (6 *&* 7 *Wm.* 4, *c.* 116), *sect.* 135; *Local Government (Ireland) Act,* 1898 (61 *&* 62 *Vict. c.* 37), *sect.* 5—*County Court Rules,* 1890, *rule* 17; *R.S.C.,* 1905, *Order* 59, *rule* 77.

An agister of cattle, maliciously driven off his lands, is, as a bailee in possession, a "person injured" within the meaning of sect. 135 of the Grand Jury (Ireland) Act, 1836, and is entitled to recover compensation for the injury done.

Punitive damages may not be awarded under the Malicious Injuries Code for injuries maliciously done to property.

The Court, having regard to the difficulty and importance of the case, awarded £50 in respect of the costs in the Court of Appeal under Order 59, rule 77, of the Rules of the Supreme Court, 1905, holding that the limit of £20, imposed by the County Court Rules, 1890, rule 17, does not apply to costs in the Court of Appeal.

Case Stated for the Court of Appeal by Mr. Justice Kenny as Judge of Assize in County Tipperary (South Riding), at the Summer Assizes, 1919, on the hearing of an appeal from the County Court Judge, under the Local Government (Ireland) Act, 1898, sect. 5. The appeal was by each of the respondents from a decree of June 26th, 1919, by which the County Court Judge awarded a sum of £70 as compensation for criminal injury.

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(1) Before Sir James Campbell C., Molony C.J., O'Connor M.R., and Ronan and O'Connor L.JJ. The case was at hearing on December 11th and 15th, 1919, before Sir James Campbell C., and Ronan and O'Connor L.JJ., by whom it was adjourned for consideration by the full Court.

The facts of the case were set forth in the case stated as follows:—

The criminal injury complained of was the driving of twenty-nine cattle on 2nd June, 1919, from the applicant's lands of Ballinourty, near New Birmingham, in the County Tipperary, whereby the said cattle were wantonly and maliciously injured and depreciated in value, and one of them died. The amount claimed was £200.

The following facts were either proved or admitted:—Twenty-nine cattle were maliciously driven from the lands of the applicant, and injured on the said occasion. Of these, twenty-seven were then in the custody, control, and care of the applicant as bailee in possession under grazing contracts with the various owners of the said animals, and under which such owners were at liberty to remove their animals from applicant's lands at any time they pleased, they being, however, liable for the grazing rent for the full period of the letting notwithstanding.

The applicant was responsible for the herding of the said cattle. It did not appear that there were any written agreements; none were given in evidence. The several owners resided in the immediate neighbourhood of the land. One of them was called as a witness on behalf of the applicant; admitted that he owned fourteen of the said cattle, and heard on the 3rd June that they had been driven off, and that there was nothing to prevent his making an application in his own name for compensation in respect thereof. The two remaining beasts were the property of the applicant. I find that these two cattle, the property of the applicant, were injured to the extent of £7, and I awarded that sum as compensation in respect of them. I held that the applicant could not recover compensation in respect of the other twenty-seven animals, inasmuch as he was not, in my opinion, a party injured within the meaning of the 135th section of the Grand Jury Act. If I am wrong in that decision, I award £63 compensation in respect of the injuries to the said twenty-seven cattle.

From the history of the antecedent malice to the applicant and his predecessors in title, and from the several circumstances surrounding the occurrence, I was of opinion that if there was power to award compensation of a punitive or vindictive character the present case was one for exercising such power. I was of opinion, however, that such damages could not be awarded, and so held, but in case I should have been wrong in so deciding I fix the sum that should be awarded on such basis at £20 additional, whether the decree be in respect of twenty-nine cattle or only in respect of two.

Prior to my decision each side had intimated its desire for a case stated in the event of my decision being adverse. Special leave to appeal, pursuant to Rule 13 of the Statutory Rules, 1900, was duly asked for, and the requisition in the prescribed form was, after the pronouncement of my decision, handed in on behalf of the applicant.

The questions for the Court are: 1, Is the applicant a person entitled to maintain the claim as regards the twenty-seven cattle which were on the lands under grazing agreements? 2, Had I power to award vindictive or punitive compensation or damages? The amount of the decree will depend on the answers to these questions. The case is one in which I will allow the applicant his costs of the appeal according to scale, whether the decree be only for £7 or for a greater sum.

Dudley White K.C. and *Kinahan*, for the appellant:—

A bailee in possession is the owner of chattels for all purposes as against a wrongdoer; as between the bailee and a stranger possession gives title, that is, not a limited interest, but absolute and complete ownership: *The Winkfield* (1). The hundred, barony, or county is for civil purposes put in the place of the wrongdoer and made answerable for his acts: *Ballymagauran Co-operative Agricultural and Dairy Society* v. *County Council of Cavan and Leitrim* (2), and anything that can be recovered against a wrongdoer can be recovered against the county. The county, acting through the posse comitatus, is liable to bring offenders to justice; the county and the posse comitatus are, so to speak, put in the shoes of the escaped wrongdoer. As to the right of bailees to recover compensation, we would also refer to *Shaw* v. *Wicklow*

(1) [1902] P. 42, at p. 60. (2) [1915] 2 I. R. 85, per Palles C.B., at p. 100.

County Council (1); *Commercial Plate Glass Co.* v. *The Lord Mayor, etc., of Belfast* (2); *In re Leslie's Presentment* (3).

[O'Connor L.J. referred to *Coldman* v. *Hill* (4), at pages 451 and 456.] Once it is established that the county is placed "in the stead of the wrongdoer," it follows that the applicant in all these cases of malicious injury is entitled, not merely to the value of the property injured, but to compensation for all loss or damage which is the natural and direct consequence of the wrong that has been done to him. The same principle is to be applied as if it were a civil action in tort against the actual wrongdoer himself. In such an action, even where there is no special damage, the jury are not limited to the actual injury inflicted, but may take all the circumstances into consideration and award vindictive damages: Mayne on Damages, 1909 edition, pages 52–3, also pages 50, 525, and 693; *Merest* v. *Harvey* (5); *Williams* v. *Currie* (6). In the latter case Maule J. says, at page 847: "If we were to hold that the jury in estimating the damage for an unlicensed trespass . . . are to be restrained to exactly the amount of the injury sustained by the plaintiff, it would in effect be placing a wrongdoer upon precisely the same footing as one who enters with the owner's permission. Besides, it is to be observed that this was not the case of a single trespass, but of a series of trespasses, persisted in day after day and for several weeks, and that this was done for the pecuniary profit of the defendant." In this case the cattle were driven off the lands of the applicant in pursuance of a similar course of conduct.

Any species of aggravation gives ground for additional damages, especially where the acts repeated are of a similar type. In America the doctrine of punishing for example's sake holds good in tort; and historically, so far as compensation is concerned, it has always been considered as "paine" for the wrongdoer as well as compensation to the victim. In an action against the wrongdoer, might not the Judge aptly say to the jury, in the language of sect. 135 of the Grand Jury Act, "give a verdict for such sum or sums of money as the person or persons so injured ought to receive for such injury or damage"? In the first part of the section the words are compensation for "any loss or damage"; and in the concluding and enacting part the words are "injury or damage." "Loss" includes complete disappearance, "damage" includes deterioration, "injury" includes both loss and damage and connotes a wrong, or, in other words, violation of a right.

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(1) [1919] 2 I. R. 115.

(2) 27 I. L. T. R. 116.

(3) 31 I. L. T. R. 215.

(4) [1919] 1 K. B. 443

(5) 5 Taunt. 442.

(6) 1 C. B. 841.

In *Noblett* v. *Leitrim County Council* (1) Sir James Campbell C., having referred to the grounds on which punitive damages are awarded, said: "I see no reason why these considerations should not apply in claims under the statute, at least in cases where the injury was proved to be an act in a widespread conspiracy of intimidation and terrorism of a particular individual or class."

Gibson K.C. and *Connolly*, for the Gortnahoe Rural District Council:—

The law of bailor and bailee has no application to a case of this kind. In every successful claim for compensation under the Malicious Injuries Code the applicant was the legal owner or a person in beneficial possession that is entitled to the use and enjoyment of the property. There are three categories of interest under sect. 135 of the Grand Jury (Ireland) Act, 1836, namely, 1, absolute ownership in fee; 2, possession, coupled with absolute right of user; 3, possession, coupled with an obligation to restore the property in the event of its being damaged. In this case the applicant was not entitled to the use of the beasts; he was a bailee in possession with no obligations, and he was not a person injured within the meaning of the statute.

Under sect. 137 the person injured shall give in his examination upon oath, or that examination shall be given by his servant or servants, who had the care of his property "so injured." While there is no authority showing that a bailee has succeeded in recovering compensation, there are cases in which a bailor was ruled out because the bailee had made the information: *Bennett* v. *King's County County Council* (2); *Smith and Elliott* v. *Tyrone County Council* (3). In the English Act of 9 Geo. 1, c. 22, the provision in regard to the examination is practically identical with that in sect. 137; and under that Act it has been decided that a steward who had general superintendence was not a servant having care of the property: *Duke of Somerset* v. *Hundred of Mere* (1). In *Lowe* v. *The Hundred of Broxtowe* (2) it was decided that the servant or servants who in the absence of a master have the general care and superintendence of the property, and who represent him in his absence, are the servant or servants who under 7 & 8 Geo. 4, c. 31, sect. 3, are required to give the examination upon oath. In *Ashtown* v. *Waterford County Council* (3) Palles C.B. quoted the words of sect. 137, and said:—"This examination plainly is, and has always been held to be, a condition precedent to the right to recover compensation; consequently, it expressly limits the right to apply for compensation to the owners of the property injured (that is, to the owners of the physical things burned or destroyed or injured), and excludes those who have no more than incorporeal rights in, or mere charges upon, that property. This, as I understand it, is the ground of the judgment of Andrews J. in *Commercial Plate Glass Company* v. *Lord Mayor, Aldermen, and Citizens of Belfast* (4), and in that judgment I concur." In the *Ashtown Case* (3) the lessee of shooting rights was held not entitled to compensation in respect of injury to his incorporeal right. Our Malicious Injuries Code includes the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), and under that Act it has been held that the herbage of a town manor, to the full right and benefit of which the freemen were entitled, was not real or personal property for the purpose of the Act: *Laws* v. *Eltringham* (5).

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(1) 53 I. L. T. R. 25, at p. 28. Now reported in [1920] 2 I. R. 143.

(2) 42 I. L. T. R. 82.

(3) [1909] 2 I. R. 674; 43 I. L. T. R. 178.

If the bailee here succeeds he is not entitled to the whole of the compensation. Where the bailee is not a man of substance, he might easily defraud the bailor or true owner.

In regard to punitive or vindictive damages, we submit that the *Ballymagauran Case* (6) does not bear the interpretation put upon it. O'Brien C., at pages 93–4, says: "The county is not placed in the position of a trespasser—no doubt all the money

(1) 6 Dow. & Ry. 247.
(2) 3 B. & Ad. 550.
(3) [1909] 2 I. R. 125, at. p. 135.
(4) 27 I. L. T. R. 116.
(5) 8 Q. B. D. 283.
(6) [1915] 2 I. R. 85.

which could be recovered from a trespasser cannot be recovered from it—but the right arises by reason of a trespass having been committed, a wrongful act involving the destruction of the property, and to the extent of some compensation the county, in lieu of the wrongdoer, is made liable. Their liability is not so extensive as the liability of the wrongdoer, but it covers some of the liability, a liability which could not come into existence but for the wrongful act by reason of which innocent persons are made legally accountable in damages." Where houses of a considerable age were burned it was held that the cost of brand-new houses worth more than the old ones could not be got from the ratepayers: *O'Sullivan* v. *Cork County Council* (1). "The true question is what sum of money will repair the injury done by the mob? What will repair the house in the situation and state in which it was at the time of the outrage committed as nearly as practicable": per Parke J. in *The Duke of Newcastle* v. *The Hundred of Broxtowe* (2).

Sealy K.C. (with him, *J. P. Kenny*), for the County Council of Tipperary (South Riding):—

A statute like the Grand Jury (Ireland) Act, 1836, should be strictly construed.

Kinahan, in reply.

Cur. adv. vult.

Sir J. Campbell C.:— Feb. 27.

In this case two serious and important questions affecting the construction of the Malicious Injuries Code were argued before us. The first of these was as to the right of a person having the custody and control of the property of another, in circumstances constituting him a bailee, to institute a claim for compensation on his own behalf in respect of the property so retained by him as bailee. In the particular case before us the owner of certain lands had upon them cattle of his own as well as cattle of neighbouring farmers, which he agisted for hire, and these cattle were made the subject of one of those senseless and cruel attacks on dumb beasts which, for the credit of the country, are, I am glad to say, becoming rare. The application included a claim in respect of the injuries to his own cattle, and a further claim in respect of the injuries to the cattle of the neighbouring farmers.

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(1) 3 N. I. J. R. 242.

(2) 4 B. & Ad. 273, at p. 282.

The first question that arises for our determination is as to the right of the applicant to compensation for the cattle which were in his custody as bailee. In the early stage of the argument I was inclined to hold that the right to compensation was confined to the beneficial owner, as being the only person who could properly be described as the person injured; but, as the case developed, I was satisfied that this construction of the section would ignore the position occupied by persons such as trustees, executors, administrators, who, while being legal owners of the property, are not necessarily or at all beneficial owners; and I have come to the conclusion that we cannot so limit the provisions of sect. 135 of the Grand Jury Act, and that such persons as trustees, executors, administrators, and bailees have such possession of, and property in, the goods under their control as entitle them to maintain a claim for compensation under the designation of "persons injured." It seems to have been settled many centuries ago that a bailee has such possession and property in the goods entrusted to his care as to entitle him to maintain any proceeding against any person, other than the true owner, for injury or trespass. That is now a settled principle of our law. Accordingly, on this first question, in common with the other members of the Court, I am of opinion that the applicant in this case has the right under the Malicious Injuries Code to recover compensation, not only for the damage to his own cattle, but also for the damage to those cattle entrusted to him by his neighbours.

The second question is also one of great importance. It arises in consequence of the added claim in respect of the high-handed, unconstitutional, and vindictive nature of the outrage; and it was argued that sect. 135, which enables the Court to make a decree for such sum or sums of money as the person injured ought to receive, entitles an applicant in a case where the elements I have mentioned are to be found to an additional sum, over and above the amount of the actual injury done, by way of

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compensation. In a recent case, *Noblett* v. *Leitrim County Council* (1), this Court decided a point which had been for a long time in doubt, that the applicant was entitled to what are called consequential damages in respect of anything which was the natural and direct result of the injury inflicted; and in the course of that case it was suggested by myself that there might be good reason why, on the assumption that the county or district was placed by law in the position of the wrongdoer, the doctrine in tort actions, which entitles a jury to give exemplary or vindictive damages, should apply to claims for compensation for malicious injuries where the facts warranted its application; but the point did not arise for decision in that case, and the expression of opinion was my own, and my own only. I have come to the conclusion that this element cannot be entertained. If one looks to the antecedent legislation as well as to the particular Act under which this claim was brought, he will find that all through the language deals with "compensation," or "amends," that is to say, restoration of the property in its original state. Compensation, I think, manifestly includes all the consequences in the way of injury that are the natural and direct result of the wrong perpetrated; but it is difficult to see—and I cannot hold—that compensation includes something over and above in the nature of an award for the punishment of the particular wrong by reason of the gravity of the circumstances in which it was inflicted.

In saying this I want to guard myself in regard to claims for the maiming, injury, or mutilation of the person, because as to these, as distinguished from injury to property, I can well understand cases in which the victim may have received permanent or unsightly disfigurement which may expose him to humiliation and degradation for the rest of his life. Sufferings of that sort of a more or less permanent character would, in my opinion, be elements proper for consideration in assessing the compensation, and I do not desire by anything I have said in this case to limit the jurisdiction or discretion of the tribunal which has to deal with exceptional cases of that kind in regard to the person. This case was conversant solely with injury to property, and in regard to that, on the true construction of the Acts, while the county is placed in the position of the wrongdoer, it is placed in that position only for the purpose of compensation, and compensation does not, in my opinion, include this element of vindictive or punitive damages.

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(1) 53 I. L. T. R. 25; [1920] 2 I. R. 143.

MOLONY C.J.:—

This is a case stated by Mr. Justice Kenny from the last Summer Assizes for the South Riding of Tipperary. It appears from the case that Mr. Worthington applied for compensation under the provisions of 6 & 7 Wm. 4, c. 116, sect. 135, as amended by 61 & 62 Vict. c. 37, for the driving of twenty-nine head of cattle from the applicant's lands, whereby the cattle were wantonly and maliciously injured and depreciated in value. It was found by the learned Judge that the twenty-nine cattle were maliciously driven from the lands of the applicant and injured. Of these, twenty-seven cattle were then in the custody, control, and care of the applicant as bailee in possession under grazing contracts with various owners of the said animals, and under which such owners were to be at liberty to remove their animals from applicant's lands at any time they pleased, they being, however, liable for the grazing rent for the full period. The applicant was responsible for the herding of the cattle, and it did not appear that there were any written agreements. The two remaining beasts were the property of the applicant. The learned Judge awarded compensation in respect of the two animals of which the applicant was the owner, but he held that the applicant could not recover in respect of the other twenty-seven, inasmuch as he was not the party injured within the meaning of the 135th section of the Grand Jury Act. The learned Judge was of opinion that the case was one in which, if he had power to award compensation of a punitive or vindictive character, he would do so, but he held that there was no power to award such compensation, and he submitted two questions for the opinion of the Court, namely:—

1. Is the applicant a person entitled to maintain the claim as regards the twenty-seven cattle which were on the land under grazing agreements?

2. Had he power to award vindictive or punitive compensation or damages?

As regards the twenty-seven cattle, the applicant was in possession of them as a bailee, and the question is as to what his rights as such bailee were against a person who wrongfully and maliciously injured the cattle while in his possession? There is no doubt upon the authorities that a bailee in possession has, as between himself and a stranger, absolute and complete ownership. In *Combs* v. *The Hundred of Bradley* (1) an action was brought against the Hundred under the statutes of Hue and Cry by a servant who was robbed on the road of £30 of his master's money and 20*s.* of his own. He declared that he was possessed ut de bonis suis propriis, etc., and it was held by the King's Bench that the action lay, for the money was his, and that he was possessed ut de bonis suis propriis against all and in respect of all but him that hath the very right. The same principle was laid down where a carrier was robbed, and he claimed to recover as owner of the goods: *Hall* v. *The Hundred of Sharrok* (2).

In modern times in *Swire* v. *Leach* (3) it was held that where goods which were pledged with a pawnbroker were illegally taken possession of, the pawnbroker might recover the full value of the goods.

All the cases on this point were considered in the elaborate judgment of Collins M.R., concurred in by Stirling and Matthews L.JJ., in the case of *The Winkfield* (4). That was a claim by the Postmaster-General as bailee of letters and parcels which were lost in transit by post by reason of the "Winkfield" being run down by another ship. Collins M.R. sums up the effect of the authorities as follows:—"I think I have now shown by authority that the root principle of the whole discussion is that as against a wrongdoer possession is title. The chattel that has been converted or damaged is deemed to be the chattel of the possessor, and of no other, and therefore its loss or deterioration is his loss, and to him, if he demands it, it must be recouped. His obligation to account to the bailor is really not ad rem in the discussion. It only comes in after he has carried his legal position to its logical consequence against a wrongdoer, and serves to soothe a mind disconcerted by the notion that a person who is not himself the complete owner should be entitled to receive back the full value of the chattel converted or destroyed. There is no inconsistency between the two positions; the one is the complement of the other. As between bailee and stranger possession gives title, that is, not a limited interest, but absolute and complete ownership, and he is entitled to receive back a complete equivalent for the whole loss or deterioration of the thing itself."

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(1) 2 Salkeld, 613.
(2) 2 Siderfin, 44.
(3) 18 C. B. (N. S.), 479.
(4) [1902] P. 42.

I am, therefore, clearly of opinion that in the present case the applicant was entitled to recover in respect of the twenty-seven cattle by virtue of his possession as bailee.

The other question reserved by the learned Judge is as to his power to give vindictive or punitive damages, and in my opinion he has no such power under the statute. Section 135 of the Grand Jury Act, 1836 (6 & 7 Wm. 4, c. 116), provides that in all cases of maliciously and wantonly injuring the property mentioned in the section, where an application for compensation in respect thereof is made, the County Court Judge may, on the consideration of the said matter, either refuse such application altogether or make a decree for such sum or sums of money as the person or persons so injured ought to receive for such injury or damage. Under this section the County Court Judge is to give compensation for injury or damage, and it is necessary to see what items of damage are included in these words. As regards the Irish statutes relating to malicious injuries preceding the Grand Jury Act of 1836, the word "damages" is used, in 10 & 11 Car. 1, c. 13, and the words "full satisfaction and amends" in 7 William 3, c. 21, but under neither of these Acts has it ever been held that the applicant was entitled to recover not only compensation, but vindictive or punitive damages.

The general principle upon which damages are given is well stated by Bowen L.J. in *The Argentino* (1): "Speaking generally as to all wrongful acts whatever arising out of tort or breach of contract, the English law only adopts the principle of restitutio in integrum, subject to the qualification or restriction that the damages must not be too remote—that they must be, in other words, such damages as flow directly and in the usual course of things from the wrongful act." This is the principle upon which damages have been hitherto given in cases of malicious injury; and this Court has decided in the case of *Noblett* v. *Leitrim County Council* (1) that the amount to be awarded should include compensation for all loss or damage which is the natural and direct consequence of the injury inflicted, and should therefore include what is known in law as consequential damages. Direct and consequential damages are both within the term "compensation," but punitive or vindictive damages stand upon an entirely different footing, and are given not merely to repay the plaintiff for temporal loss, but to punish the defendant in an exemplary manner: *Finlay* v. *Chirney* (2). The principle upon which vindictive damages may be given is, I think, accurately stated in Halsbury, vol. x, page 307, in an article written by Sir Ernest Pollock:—"In order to justify the award of exemplary damages, it is not sufficient to show merely that the defendant had committed a wrongful act. The conduct of the defendant must be high-handed, insolent, vindictive, or malicious, showing a contempt for the plaintiff's right, or disregarding every principle which guides the conduct of a gentleman." This statement, which is amply borne out by the authorities to which the writer of the article refers, shows that exemplary damages are entirely different from compensation, and are not at all within the purview of sect. 135 of the Grand Jury (Ireland) Act, 1836.

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(1) 13 P. D. 191, at p. 200.

In my opinion, therefore, the first question put by the learned Judge should be answered in the affirmative, and the second question in the negative.

O'Connor M.R.:—

In my opinion this case is covered by authorities which are binding upon this Court, and I do not think that it is necessary to go into an historical review of the law, or that I can serve any good purpose by doing so. The judgment of the Court of Appeal in *The Winkfield* (3) clearly establishes that a bailee in possession can recover as against a stranger for a trespass to goods, although he would have had a good answer to any action by the bailor,

(1) 53 I. L. T. R. 25; [1920] 2 I. R. 143.

(2) 20 Q. B. D. 494, at p. 504.

(3) [1902] P. 42.

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and that a wrongdoer, who is not defending under the title of the bailor, is quite unconcerned with the rights as between bailor and bailee, and must treat the possessor as the owner of the goods for all purposes. In fact, as it was said, the root principle of the whole discussion is that as against a wrongdoer possession is title.

The Winkfield (1) also confirms the established law that a bailee is bound to account to the bailor for the damages recovered in respect of the destruction or conversion of the thing bailed, so that the interests of both parties may ultimately be compensated for, but that the wrongdoer has no concern with such an adjustment.

This being the law, there only remains for consideration the question whether in a claim for a malicious injury against the grand jury of a county by a bailee in possession the grand jury is in the position of a trespasser. Here, again, as it seems to me, we have the legal position of the grand jury in cases of malicious injuries defined by the decision of this Court in *Ballymagauran Co-operative Agricultural and Dairy Society* v. *County Councils of Cavan and Leitrim* (2) as that of trespassers, thus placing it in the same position as that of an actual wrongdoer. I need not go into the historical account both of the common and statute law which was given by the late lamented and learned Lord Chief Baron. Suffice it to say that he showed that the liability of grand juries for malicious injuries was in kind the very same liability which was imposed on the hundred of Saxon and Norman times, and that the grand juries, as were the hundreds, are placed in the stead of the wrongdoer, and are for all civil purposes in their place. No doubt the immediate question in that case was whether the owner of property, who was insured against damage, could recover irrespective of the insurance—a question not the same as that in the present case—but the principle of the decision in my opinion applies. For the purposes of the decision the grand jury was treated as the wrongdoer.

I may point out a provision in the Grand Jury Act which seems to confirm the view of the Chief Baron. The liability imposed was not merely the liability of the grand jury within whose bailiwick the offence was committed, but in cases of injuries committed near the boundary of a county there is power to throw the liability on such portion of the adjoining county as is contiguous to the locality in which the offence was committed. The meaning of this is not that the inhabitants of the district are criminally or even morally responsible for the offence, but it does mean that they are the people who may be able by alertness and discouragement of crime to repress the commission of outrages in the surrounding district. I think that this provision goes far to support the view of the Lord Chief Baron that the inhabitants and the grand jury representing them are placed, for the purposes of the Grand Jury Act, in the position of wrongdoers.

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(1) [1902] P. 42.

(2) [1915] 2 I. R. 85.

I wish further to point to some words in sect. 135 which appear to me to be almost an express recognition that the bailee of goods may make the claim for a malicious injury. There is included among the properties in respect of which a claim may be made by the person to whom such properties belong any boat or barge laden with corn or other provisions. · It is clear that the section contemplates a claim not merely for the boat or barge, but also for the cargo, and that the same person may make the claim in respect of both, although that may not necessarily be so. Now, I think that we may take judicial notice of this—that the owner of the boat or barge is as a rule not the owner of the cargo, so that we have a permission to the owner to make a claim not merely in respect of his own property, but also in respect of the cargo, of which he is only a bailee.

One other question remains: What is the quantum of damages which ought to be awarded? Must they be limited to the mercantile value of the goods actually destroyed or injured, or may they include consequential damages, or may vindictive damages be added? The claim must set forth "the loss or damage occasioned by such offence" and "the amount of damage thereby sustained." The sum to be presented on such claim is such sum of money as the person injured "ought to receive for such injury or damage." Now, I can quite conceive cases in which the depreciation in mercantile value of the physical thing injured or its complete loss would be only a part of the total commercial loss. The partial or complete destruction of stock-in-trade may mean much more to a trader than the cost of replenishing it.

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It may mean the loss of profits for a season of trade. It may involve a serious injury to trade, and perhaps involve the trader in bankruptcy. Here would be a damage flowing directly from the destruction of goods and its natural consequence; and it seems to me to be damage which the person injured "ought to receive," and which the tribunal assessing the damage may take into account.

But I do not think that there is any room for what is known as vindictive or punitive damages. The act is aimed at compensation for loss or injury to property, and property only. There is nothing to suggest damages for mere aggression or wounded feelings, or by way of punishment for mere misconduct.

RONAN L.J.:—

In the *Ballymagauran Case* (1) Palles C.B. traces the history of the legislation on this subject back to the Statute of Winchester, which lies at the root of the matter. It would appear from 2 Hawkins, Pleas of the Crown (p. 115, sect. 2), that by the common law the town or hundred is liable to be amerced by the King, but (p. 116) that the right of action is only given by the statute. The subject is fully treated in 19 Viner's Abridgment, p. 255 and following pages, where this also appears: "There be two kinds of hue and cry: the one by the common law, and the other by statute. Thereupon, there are two pursuits: the one for the King; the other for the party by private suit."

In the original note of Serjeant Williams to *Pinkney* v. *Hundred of Rutland* (2), it is pointed out that the action must be "brought as well for the King as the party suing, because the inhabitants of the hundred are guilty of a great contempt of the King, for which they may be fined if they neglect or refuse to pursue the robbers; and it is an established rule that in every case of a contempt to the King the action must be brought as well to answer the King as the party. Besides which the statute supposes that the negligence or refusal of the inhabitants to pursue the felons proceeds from some of the inhabitants being either the receivers or abettors of the felons." This has the

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(1) [1915] 2 I. R. 85.

(2) 2 Williams Saunders, 758.

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additional authority of so great a lawyer as Sir Edward Vaughan-Williams in his edition of Williams' Saunders (1871), from which I have taken the quotation.

The Lord Chief Baron points out at pp. 100-101 of his judgment in the *Ballymagauran Case* (1) that the origin of the proceedings both in England and Ireland is the Statute of Winchester. He says (p. 100): "Neither hundred nor barony is treated as the actual wrongdoer, but in each it is placed in the stead of the wrongdoer, and bound to answer for his default by reason of its presumed negligence in permitting the wrongdoer to escape without arrest upon hue and cry."

The subject is also fully dealt with in 4 Bacons, Abridgment, p. 242 and following pages. At p. 243 the note states the effect of the cases, "that this is not a penal law . . . but is a law made for the peace of the kingdom and advancement of justice." The same note cites seven or eight cases to show that the action is only given by the statute. This Act is the foundation of all the legislation. The inhabitants were certainly not treated as "innocent ratepayers," nor was the statute treated as a penal statute. In the note to *Pinkney's Case* (2), it is stated that the action is in the nature of an action for taking goods. At p. 246 of Bacon, and at p. 259 of Viner, there are clear statements as to who can sue. They put it beyond doubt that a bailee in possession can recover in respect of chattels, not his own property, but in his possession as bailee. The case, *Combs* v. *Hundred of Bradley* (3), cited by the Lord Chief Justice, is only one of several cited in these works to the same effect. I may instance the case of the carrier in 2 Siderfin, p. 45, sub-section 4. At p. 246 of Bacon's Abridgment, vol. iv, it is stated: "If a servant be robbed in the absence of his master, it is clear that the master may maintain an action for it against the hundred," and that "also the servant being robbed in his master's absence may himself maintain an action against the hundred, and may declare that he was possessed ut de bonis suis propriis, &c. And though the jury find that he was robbed of his master's money, yet he shall recover; for the servant is possessed ut de bonis propriis against all, and in respect of all, but him that hath the very right";

(1) [1915] 2 I. R. 85. (2) 2 Williams' Saunders, 758. (3) 2 Salk. 613.

and the authorities are referred to for these propositions. I think therefore there can be no question that the principle so fully stated in *The Winkfield*(1) applied to actions against the hundred, and that the general principles stated at 387–389 of the last edition of Pollock on Torts are fully justified by the authorities there cited.

The practical necessity for such a principle is apparent if we consider the case of a carrier, a watchmaker, an auctioneer, or a pawnbroker, who has in his possession a quantity of goods belonging to many persons. The cases of trustees and executors are still more striking instances.

On the second question I have had more difficulty. If the action is one of trespass to goods, it is difficult to see why the ordinary principle of the law of trespass should not apply as to damages. In trespass with violence or with oppression the damages are not confined to the pecuniary loss. In cases of tort there is no element that increases the damages more than malice. Accidental injury causing damage to property and malicious injury doing the same thing are regarded by judges and juries in a wholly different way when they come to measure damages. There can be no such contrast in cases under sect. 135 of the Grand Jury Act, for to come within it the injury must be malicious. The words of the section are "application for compensation in respect thereof." This is for the injuries to property already mentioned; and upon the hearing of such application the County Court Judge may "make a decree for such sum or sums of money as the person or persons so injured ought to receive for such injury or damage." These words seem to me not equivalent to "may award such damages for the wrongful act as they think just in all the circumstances of the case." Although the old action may have been for trespass, still it seems to me to have been in substance more in the nature of an action of negligence, and the Lord Chief Baron evidently took this view.

It will be observed that the language is not "such sum as the person injured ought to receive as damages for the injury," but "for such injury or damage." Possibly the facts that the action

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(1) [1902] P. 42.

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must be brought on behalf of the King as well as of the party, and that the King has power to amerce the hundred, explain why punitive or exemplary damages were left in his hands, and not given to the party.

The only case I have found bearing on the question is *Duke of Newcastle* v. *Hundred of Broxtowe* (1). It was an action under 7 & 8 Geo. 4, c. 31, for the demolition of Nottingham Castle, the property of the Duke of Newcastle, by a riotous mob. The jury found £21,000 damages. It was sought to set aside the verdict on the ground (inter alia) of excessive damages. Parke J., giving the judgment of the Court (at p. 282), says: "The jury would have done wrong to take into their consideration whether the castle was an ancient possession of the noble family of the plaintiff or not, whether the plaintiff was likely to reside there, and whether the neighbourhood was suitable to such a residence. The true question is, what sum of money will repair the injury done by the mob; what will replace the house in the situation and state in which it was at the time of the outrage committed as nearly as practicable?" They held that the jury seemed to have acted on the right principle. This judgment seems to me wholly inconsistent with the idea that the violence and unlawful conduct of the mob could be considered as increasing the damage. Indeed the judgment seems to reduce the damages below the ordinary modern rule in compensation cases, i.e., the loss to the owner. The case is cited and its effect stated in the notes to *Pinkney's Case* (2). There is no suggestion that the principle laid down is not correct. If there ever was a case for vindictive, punitive, or exemplary damages, it is difficult to conceive a stronger case; I only found it when this case was standing for judgment.

I concur in the observations of the Lord Chancellor, that our judgment is confined to injuries to property.

SIR J. CAMPBELL C.:—Lord Justice O'Connor, who is not able to be here, has asked me to say that he agrees with us on both grounds.

Mr. White K.C.—In regard to costs, there has been an erroneous impression that the amount which may be awarded in this Court is limited to £20. Rule 17 of the County Court Appeals (Ireland) Rules, 1900, states that "the cost of appeals to the Court of Appeal shall, where so directed by that Court, be taxed by one of the Taxing Masters of the Supreme Court, and in each case such taxation shall be according to the following principle: In any case in which costs are awarded, the costs shall be taxed with due regard to the scale of costs in the second schedule hereto, with power to the Judge of Assize or Court of Appeal, where the amount allowed or claimed, as the case may be, exceeds £50, to allow such larger amount of costs, not exceeding in the whole £20, as shall appear to be just and reasonable, where from the difficulty or importance of the case or the work actually performed the allowances under the above-mentioned scale appear to be inadequate. The same scale shall apply to costs as between solicitor and client." Under a mistaken view, costs appear to have been fixed under this rule (which is the only rule on the question given in Moloney and Lee on Compensation for Malicious Injuries). In a difficult and important case like this, the scale costs under that rule would be absurdly meagre, and the limit of £20 would be wholly inadequate. Rule 77 of Order 59 of the Supreme Court Rules, 1905, which seems to have been overlooked, enables the Judge of Assize or the Court of Appeal, when the amount claimed or allowed exceeds £50, "to allow such larger amount of costs as shall appear to be just and reasonable where from the difficulty or importance of the case or the work actually performed" the allowances under the above-mentioned scale appear to be inadequate." In this rule there is no limit to what the Court may allow, but the scale of costs in Appendix S, Part 2, section 8, to which due regard shall be had by the Taxing Master, would, if adhered to, be grossly insufficient. Accordingly, we ask that the Court should direct the Taxing Master to tax the costs in this case on the ordinary High Court scale.

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(1) 4 B & Ad. 273.

(2) 2 Williams' Saunders, 758.

SIR JAMES CAMPBELL C.—This is a case that affects the administration of the malicious injuries code. It is of great interest to county and district councils, and it is hard that it should be fought by the applicant as a test case where it is obvious that unless there is some reasonable provision as to costs he loses by coming here. Do you (to Mr. Gibson) admit that Rule 77 applies?

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Mr. Gibson K.C.—I do, but the applicant himself has made it a test case.

Sir James Campbell C.—This is an appeal by way of case stated, and we deal with the costs before the Judge of Assize and here. I have always felt—and so have my colleagues—that the supposed limit of £20 was entirely inadequate, or at least might be so in certain cases. Mr. White has drawn our attention to Rule 77 of Order 59 of the Rules of the Supreme Court, 1905, under which we can make awards as to costs in proportion to the work involved and the obligation cast upon counsel and solicitors. This case has been at hearing four days, and I do not think anybody can suggest that any time was lost or wasted; and, accordingly, we have come to the conclusion that we will award a sum of £50 in respect of the costs in this Court. As to costs of appeal before Mr. Justice Kenny, we fix these at £10, plus £12 10*s.* witnesses' expenses. We do not interfere with the order of the County Court Judge.

Solicitor for the applicant: *L. J. Ryan.*
Solicitor for Gortnahoe R.D.C.: *J. S. Kennedy.*
Solicitor for Tipperary (S.R.) Co. Council: *F. E. Tidd.*

C. L.

Appeal.
1920.
Jan. 16.

IN RE PETER O'REILLY, DECEASED (1).

Administration—Grant to a stranger—Probate Act (Ireland), 1857 (20 *&* 21 *Vict. c.* 79), *sect.* 78.

Under the 78th section of the Probate Act (Ireland), 1857, the Court may, in a proper case, give liberty to a stranger, passing over the next-of-kin, to apply for a grant of administration, if, on the facts, the Judge is satisfied that it is expedient to do so.

APPEAL by Catherine O'Reilly from so much of an order of Mr. Justice Kenny, dated 21st November, 1919, as gave liberty to Margaret Anne O'Reilly and Owen Brady to apply for a grant of letters of administration of the unadministered goods of Peter O'Reilly, deceased.

Peter O'Reilly, the deceased, died on the 18th June, 1918, intestate and a married man, leaving him surviving Ellen O'Reilly, his widow, Catherine O'Reilly, his sister, James O'Reilly, a step-brother (who had since died in Australia), and the children of two step-sisters, all of which children lived in Australia and New Zealand.

The assets of the deceased, in addition to farming stock, money in bank, and personal chattels, consisted of business premises in Kingscourt, a judicial tenancy in a farm in Leiter, Co. Cavan, and an undivided share in a farm and premises, where the deceased resided with his wife, in Taghart South, known as Mountain House.

On the 14th of October, 1918, Ellen O'Reilly obtained a grant of letters of administration of the estate of the deceased, and after her husband's death she continued to reside at Mountain House.

On the 25th of November, 1918, in an action in which James O'Reilly and Catherine O'Reilly were plaintiffs and Ellen O'Reilly defendant, the Master of the Rolls made an order for the administration of the estate of the deceased.

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(1) Before SIR JAMES CAMPBELL C., and RONAN and O'CONNOR L.JJ.

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On the 7th of July, 1919, Ellen O'Reilly died, having previously made her will, whereby she disposed of her property to persons other than her own and her husband's next-of-kin. She appointed Margaret Anne O'Reilly and Owen Brady her executrix and executor. They had lodged the papers to obtain a grant of probate, but a caveat on behalf of the nephews and nieces of Ellen O'Reilly had been lodged by the solicitor for Catherine O'Reilly. The executrix and executor had issued a writ against the caveators claiming probate of the will.

In these circumstances two applications were made to Mr. Justice Kenny: one by Catherine O'Reilly, asking that she, or in the alternative, Francis E. Irvine, estate agent, be at liberty to apply for a grant of letters of administration de bonis non of the estate of Peter O'Reilly, deceased; and the other by Margaret Anne O'Reilly and Owen Brady, asking that they, or one of them, be appointed administrators de bonis non of the said deceased on the ground that they were the executors named in will of Ellen O'Reilly, who as widow of the deceased was entitled to the greater part of his estate, and were the persons most interested in the assets.

Catherine O'Reilly claimed that in her own right she was entitled to the greater portion of the farm and dwelling-house at Mountain House; that she had also an interest in other property of Peter O'Reilly, including a sum of £575 lodged in their joint names in bank; and that as the only next-of-kin of the deceased within the jurisdiction she was entitled to the grant of administration de bonis non to the personal estate of the deceased.

It appeared that all the movable personal estate of the deceased had been realized in pursuance of an order made by Mr. Justice Samuel, as Vacation Judge, by whom an administrator ad colligenda bona had been appointed. Inasmuch as Catherine O'Reilly claimed to be entitled to the £575 lodged in the jóint names of herself and Peter O'Reilly, and as this claim should be opposed by some person representing the estate, it would—Margaret A. O'Reilly and Owen Brady submitted—be detrimental to the estate to appoint her administratrix.

The order made by Mr. Justice Kenny was as follows:—"It is ordered by the Court that the application for a grant by the said Margaret Anne O'Reilly and Owen Brady claiming to be such executors aforesaid (of the unproved will of Ellen O'Reilly, deceased) be refused, but the Court, being of opinion that under the special circumstances of this case it is expedient to appoint some person to be administrator of the personal estate unadministered of the said deceased other than the person who, had the Act of 20 & 21 Vict. c. 79, not been passed, would by law have been entitled to a grant, it is ordered by the Court that the said Margaret Anne O'Reilly and Owen Brady be at liberty to apply for a grant of letters of administration of the unadministered goods of said deceased, as in a case of intestacy, they giving security according to the course of the Court; and it is further ordered that all caveats, warnings, and appearances entered by or on behalf of the parties be, and the same are hereby, set aside." From this order Catherine O'Reilly appealed.

Dickie K.C. (with him *James Henry*), for the appellant :—

Where there is only a sole next-of-kin he cannot without his consent be deprived of a grant of administration. The Judge has no power under sect. 78 of the Probate Act (Ireland), 1857 (20 & 21 Vict. c. 79), to appoint an outsider against the wishes of the next-of-kin. Sect. 73 of the English Probate Act, 1857 (20 & 21 Vict. c. 77), is in identical terms with sect. 78 of the Irish Act. There has been up to the present no case in England in which a grant has been made under sect. 73 to a stranger without the consent of the next-of-kin. A grant was refused to nominees of next-of-kin who themselves had no interest in the property of the deceased: *In the Goods of Hale* (1). Where all the parties interested in the estate of the deceased had entered into a compromise, a grant of administration was made to a stranger in blood "subject to consents of the widow and all the parties interested": *Potter* v. *Potter* (2).

The Solicitor-General (*D. M. Wilson K.C.*) and *T. J. Smyth*, for the respondents, were not called upon.

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(1) L. R. 3 P. & Div. 207.

(2) [1899] P. 265.

It is rather startling to find that this courtesy is to be considered as any abandonment of rights, and that a document completed in good faith and according to contract is not to be regarded as the contract upon which the whole transaction proceeded merely because "the documents are to follow." It may be urged that though the defendants had knowledge there was to be a charter-party or bill of lading they had not notice of the particular document. That is immaterial—they knew the stipulations here in question would be contained in whatever form of charter-party or bill of lading had been adopted.

There is no necromancy either in a charter-party or a bill of lading. They are evidence of and contain the contract between the consignor and the ship. But in all the cases stress is laid as regards the consignee on the question—"Had he notice of the terms upon which he was to accept the cargo?" He could have notice by having a copy of either the charter-party or bill of lading, or he could have notice independently.

This matter of notice is the beginning, middle, and end of commercial law. It was to this Mr. Justice Willes and Mr. Justice Brett directed all their energy in a number of cases, notably in the leading case of *Gray* v. *Carr* (1), where it was sought to make the consignee liable not only for demurrage at the port of unloading, but also for demurrage at the port of loading and for dead freight, for not shipping a full cargo, and for damages for delay at the port of loading beyond the days allowed on demurrage.

The position of no one was altered by the non-arrival of the bill of lading. The consignees could not have claimed anything under the document that was not conceded to them by the ship, and they did claim and receive rights they could not have claimed save under the contract contained in the charter-party and bill of lading. On this question of whether the cargo was in fact delivered under the bill of lading the subsequent conduct of the defendants is clearly evidence, and conclusive evidence.

On the 15th July the plaintiffs write to the defendants:—"We are advised that the 'Temaire' s.s. left Dublin last night for Liverpool. Kindly send us closed accounts and balance of freight at your early convenience. Please note that this boat

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(1) L. R. 6 Q. B. 522.

K. B. Div.
1919.
May 6.
Appeal.
Oct. 28, 29.
Dec. 19.

NEENAN *v.* HOSFORD (1).

Negligence — Contributory negligence — Continuing negligence of plaintiff — Continuing negligence of Defendant — Cause of injury.

The plaintiff, an active woman, was desirous of crossing a thoroughfare in the City of Cork in broad daylight. She stepped off the footpath to cross the street, and, according to her own evidence, stood for a short period about one yard outside the kerb to let the traffic clear. There was a van standing five or six yards to her left, and she was looking to the left, when suddenly she became aware of the approach of a horse and van, and she was knocked down and sustained injuries. The horse and van which collided with the plaintiff were the property of the defendant, the van being a bread-van; and the evidence of the driver, which was otherwise corroborated, was that when at a distance of about ten yards from the spot where the plaintiff stepped off the kerb, and without having seen the plaintiff—if, in fact, she had then left the foot-path—he turned round to push back a loaf of bread which was in danger of falling from the front of his van, and when he again looked to his front he endeavoured to pull up, but was too late to avoid the accident.

The jury found that the defendant's driver was guilty of negligence, that the plaintiff was guilty of contributory negligence, and that the defendant's driver could not, by the exercise of reasonable care, have avoided the consequences of the plaintiff's negligence, and judgment was entered for the defendant. On a motion by the plaintiff for a new trial:

Held, by the Court of Appeal (Sir J. Campbell C. and O'Connor L.J., Ronan L.J. diss.), reversing the decision of the King's Bench Division (Gibson and Gordon JJ.), that the original negligence of the defendant's driver in turning round was not a continuing negligence, but that the accident was occasioned by the negligence of the plaintiff, and that she was not entitled to a new trial.

Ronan L.J. (diss.) *held* that there was ample evidence that if the driver had kept a reasonable look-out he could have avoided the accident, and that the plaintiff was entitled to a new trial.

British Columbia Electric Railway Company, Ltd., v. *Loach* ([1916] A.C. 719) considered.

NEW TRIAL MOTION.

This was an action brought to recover damages for injuries caused to the plaintiff by the servant of the defendant by reason of his negligent and unskilful management and driving of a horse and bread-van at Great George's Street, in the City of

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(1) Before GIBSON and GORDON JJ.

Cork, on the 11th day of March, 1918, which said horse and van were and are the property of the defendant.

The action was tried before the Right Hon. Mr. Justice Pim and a common jury on the 14th January, 1919, when the learned Judge, upon the findings of the jury, directed a verdict for the defendant.

The material portions of the learned Judge's report of the trial were as follows:—

The following is the evidence which was given in the case:—John Lawrence Feirn, civil engineer, proved the maps in the case, showing where the accident took place, and the various distances.

Mary Neenan (the plaintiff):—"I am the widow of Denis Neenan, tanner. I live in William O'Brien Street, Cork. I am possessed of some house property, which I look after myself. On the 11th March, 1918, I went to the Augustinian church at about 3 o'clock. I had an appointment there. I left at about 3.15, and stepped off the footpath to cross the street. I stood about one yard outside the kerbstone to let the traffic clear. There was a van standing five or six yards to my left. I was looking to the left, and suddenly I saw a horse up to my face. I had no power to jump; it was too near. I put up my hand. The horse, I think, reared. I was thrown down on my hip, and in the fall my right arm swung, and was wrenched. The wheel of the cart went over my left leg. I was helped up and taken to O'Sullivan and Howard's. I was there for a while. I was quite dazed. I noticed a policeman taking a statement from a boy. The defendant Hosford then came in. The boy was still there. Hosford said: 'Is it you I have?' He knew me. He said to the boy: 'What brought you this way?' The boy said there was a car in Castle Street, and he could not go up that way. Hosford said: 'How did this occur?' The boy said that the bread was falling out of the window of the van (this is a small window in the front of the van, facing towards the horse), and 'I was looking behind, and did not see the woman at all.' Hosford said: 'That is right; tell the truth.' He said to me, would I go to the infirmary, or would he send for the ambulance. He got me a covered car, and drove me home, and telephoned for Dr. O'Mahony . . ."

K. B. Div.
1919.

NEENAN
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HOSFORD.

Cross-examined :—" I do not know if I looked up and down the street before going out on the road. I may have been standing in the street for five minutes. I told Hosford that I was going to a graveyard, and was waiting for a friend. I further told him that I had left the kerb, but that there were cars in front that prevented me crossing. It was then the wheel of the car struck me . . . I stood two or three minutes in the street off the kerb, and I was watching the traffic going up from the left."

Sergeant John Patterson :—" On the 11th March, 1918, I was on duty on the Grand Parade. I heard of an accident, and I went to the place. I saw Mrs. Neenan and the boy in the shop. Mrs. Neenan was on a chair ; she appeared to be suffering. She made a statement to me. The boy also made a statement. He said he was engaged at the time of the accident in closing the window of the van, and did not see the woman until the pony was up to her. He said :—' I did my best to pull up, but she was knocked down before I could stop him.' Great George's Street is asphalted, and has no crossings." Cross-examined :— " I do not recollect that she said it was partly her own fault. Mrs. Neenan said : ' As I was crossing I was knocked down by a bread-van. A cart was passing, and I stayed to let it pass. The bread-van was coming up the opposite way, and knocked me down . . . ' "

Daniel MacSweeney (for the defendant) :—" . . . I will be seventeen years of age next June. I had been driving the cart for about seven months before the accident took place. The pony was an old pony of sixteen or seventeen years. The van was packed with bread. I was going down George's Street on the left-hand side. I had turned out of the North Main Street. I saw nothing ahead of me at the Augustinian church. There was a loaf of bread falling out of the front window. I turned round for a few seconds to fix the loaf, and when I turned back I saw the woman. She was too near the van for me to pull up. The left shaft struck her. There was nothing between me and the chapel. At the time she was struck I was about two doors away from the chapel, which I had not passed. When I turned to push back the loaf, I was about ten yards from the place where the accident occurred. I was going slowly, perhaps about five miles an hour. I went into O'Sullivan and Howard's. I heard her make no statement. I made a statement myself, the same as I am making now. If I had seen the woman, I could have avoided her. She was apparently walking slowly."

Cross-examined :—"The van was a kind of a float. I was sitting on the shaft. The window was in front of the van. The loaves were falling out, and I could not shut the window. I had to put the loaves back. The pony took a shy when she went over the woman's leg, and I had a job to stop her. I did not see the stationary van."

Joseph Hosford, the defendant :—"I asked the plaintiff what happened. She said she had stepped off the kerb to cross the street to her tram. She said, 'I left the footpath without looking, and did not see anything until I was knocked down. It was partly my own fault.' She said nothing to me of the traffic on the other side . . . I visited her again that night, and she repeated exactly the same thing again on a later occasion."

Cross-examined :—". . . I asked the boy how it occurred. He repeated exactly what he has said here to-day. He said: 'There was no one in the street when I turned to put in the bread.' He said he saw her first as the pony hit her . . ."

Mr. Lynch K.C. asked me to recall the jury, and tell them that if the driver was negligent before he saw or approached the plaintiff, and if that negligence continued up to the time of the accident, the jury were entitled to find that the continued negligence was the cause of the accident.

I refused to recall the jury and to make the statement to them, which I am not sure that I completely understand, but which, so far as I do understand it, does not seem to me to be good law. The only negligence alleged was the turning round to put back the bread. It was not suggested that the van was on the wrong side of the road, or was being driven too fast.

The following questions were submitted to the jury, and answered as hereinafter mentioned :—1. Was the driver guilty of negligence in driving the van on the 11th March, 1918? Answer, "Yes." 2. Was the plaintiff guilty of contributory negligence? Answer, "Yes." 3. Could the defendant by the exercise of reasonable care have avoided the consequences of the plaintiff's negligence? Answer, "No." 4. Assess damages. No answer.

The motion for a new trial was based on the grounds inter alia—(*a*) that the learned Judge should have directed the jury that, if the defendant's driver had by his negligence placed himself in such a position that he could not avoid the consequences of the plaintiff's negligence, the jury might and should find that it was this continuing negligence on the part of the driver that was the cause of the accident; (*b*) that the learned Judge misdirected the jury in telling them that in considering this question (i.e., of avoiding consequences of plaintiff's negligence) the point of time for the jury to consider was from the moment when the defendant's driver first actually saw the plaintiff; (*c*) that the learned Judge should have directed the jury that, although the plaintiff's negligence may have directly contributed to the accident, she was entitled to recover if the defendant's driver could by the exercise of ordinary care and caution have avoided the consequences of such negligence.

Lynch K.C. and *Rearden* (with them *Swayne K.C.*), for the plaintiff:—

The learned Judge at the trial told the jury that in considering the question whether the defendant's driver could have avoided the consequences of the plaintiff's negligence, the point of time to be considered was from the moment when the driver saw the plaintiff on the road. We submitted that that was not so, and asked his Lordship to re-call the jury, and to tell them that if the driver was negligent before he saw or approached the plaintiff, and if that negligence continued up to the time of the accident, the jury were entitled to find that the continued negligence was the cause of the accident. The learned Judge refused to do so. We were entitled to have the jury directed in the terms of our requisition.

The driver was clearly negligent in going on once he had turned round. There was a clear finding by the jury that both plaintiff and the defendant's driver were negligent, and there was some evidence to support both findings. Our requisition to have the jury properly directed was therefore vital. It was the driver's duty to keep a proper look-out. He admits he did not see the ment for the detention of the ship at Memel before the bills of lading were signed—a fact of which the consignee knew nothing, and of which the charter-party would not inform him.

In this case Lord Campbell sent for the papers in *Wegener* v. *Smith* (1), and ascertained that the demurrage sued for in that case had accrued in the port of delivery, and had arisen from the default of the defendants in not receiving the goods. And in the Court of Error Jervis C.J. said the action was for demurrage for his (the defendant's) own delay. Both are recognized as authorities in *Gray* v. *Carr* (2).

It remains to say a word or two upon the case of *Young* v. *Moeller* (3). It is reported in the King's Bench at page 7 of the same volume. The full Court, consisting of Lord Campbell C.J., Wightman, Erle, and Crompton, decided in favour of the plaintiff unanimously. The decision was reversed in the Exchequer Chamber by Baron Parke presiding, Mr. Justice Cresswell, Baron Platt, Mr. Justice Williams, and Baron Crowder. A good deal turned upon the pleading. The claim was for a breach of contract to receive. The action was against the assignee of a bill of lading. The Court in error did not purport to overrule previous decisions. It distinguished them. The assignee had received a part only of the contract. Baron Parke held that that was not the same as receiving the whole. He was bound by the decision in *Sanders* v. *Vanzeller* (4), in which he held that the acceptance of the whole might furnish evidence of a contract. Counsel pressed *Jesson* v. *Solly* (5) upon him. "In that case it was held that the consignee was liable for 'demurrage.'" (Baron Parke: "Yes, on delivery." "The Court said, 'If the consignee will take the goods he adopts the contract.'") There can be no doubt whatever that Baron Parke's attitude to the Judge-made law permitting a jury to find a new contract, thus filling up the gap in commercial law, which transferred the property in the goods without transferring the contractual agreement between the consignor and the ship, was one of hostility.

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(1) 15 C. B. 285.
(2) L. R. 6 Q. B. 522.
(3) 5 Ell. & Bl., at p. 755.
(4) 4 Q. B. 260.
(5) 4 Taunt. 52.

road. Such a person commits a continuing trespass, and is liable to any person lawfully and properly using the roadway. But can it be said that such a defendant having done the negligent act, and not further interfering, is responsible to a plaintiff who negligently drives up, and who could have avoided the consequences of the defendant's negligence? I think that view is inconsistent with *The Bernina* (1), the case in which Lord Lindley elaborately considers all the authorities, and points out that the plaintiff is under the same obligation to avoid the consequences of the defendant's negligence as the defendant is to avoid the consequences of the plaintiff's negligence.

In a case of the present type, we are dealing with a human agent controlling a vehicle, and different considerations may arise. The plaintiff in this case was guilty of negligence in two respects: in the first place, in standing on the roadway; and, secondly, in crossing the road while looking in the wrong direction, away from the direction in which the traffic was coming. From the human point of view a jury would probably be right in putting the entire blame on her. The difficulty in the case is caused by the fact that the driver of the defendant's vehicle had his head turned away so as not to be on his guard, and was negligent in so doing. The law applicable to such a state of facts is admirably stated in the judgments of a very strong Privy Council Board (consisting of Viscount Haldane, Lord Parker of Waddington, and Lord Sumner) on appeal from the Canadian Court of Appeal in the case of the *British Columbia Electric Railway Company, Ltd.*, v. *Loach* (2). In that case the language was adopted of Mr. Justice Anglin in *Brenner* v. *Toronto Railway Company* (3), who pointed out in his judgment that there was "a class of cases where a situation of imminent peril has been created, either by the joint negligence of both plaintiff and defendant, or, it may be, by that of the plaintiff alone, in which after the danger is or should be apparent there is a period of time of some perceptible duration, during which both or either may endeavour to avert the impending catastrophe . . . If, notwithstanding the difficulties of the situation, efforts to avoid injury duly made would have been successful, but for some self-created incapacity which rendered such efforts inefficacious, the negligence that produced such a state of disability is not merely part of the inducing causes—a remote cause or a cause merely sine qua non—it is in very truth the efficient, the proximate, the decisive cause of the incapacity, and therefore of the mischief . . . Negligence of a defendant incapacitating him from taking due care to avoid the consequences of the plaintiff's negligence may, in some cases, though anterior in point of time to the plaintiff's negligence, constitute 'ultimate' negligence, rendering the defendant liable notwithstanding a finding of contributory negligence of the plaintiff . . ." A person who could have avoided an accident, if he had kept a proper look-out, cannot afterwards say, if he turns away or shuts his eyes to what is happening, I did not see and, therefore, could not avoid the collision. Accordingly, in my opinion, the driver in this case, having his head turned the wrong way, might be regarded as guilty of continuing negligence causing the calamity, no matter how gross was the negligence of the plaintiff. His incapacity to avoid the collision was self-created. The question for the Court, therefore, comes to this: On the evidence as it stands was there a possible case which reasonably might be considered by the jury, that the defendant's driver if he had been on the look-out all through could have avoided the collision? As to that question, on the evidence I had for some time considerable doubt. It is clear—and in this I agree with Mr. Healy's contention—that if at the moment the driver turned his head the woman stepped out, the plaintiff would have no cause of action. The negligences of each would be simultaneous. We must look to the order of events. Is the evidence on this point so uncertain and equally balanced that it comes within the decision of *Cotton* v. *Wood* (1), or is there some evidence from which the jury might infer that the plaintiff was on the roadway at a point of time at which, if the driver was on the look-out, he would not have run the plaintiff down? I have had much doubt on that branch of the case, but on the whole I agree with plaintiff's counsel that on the evidence the jury might infer that the defendant, who was in the wrong in turning his head round, and thereby negligent, if he had kept a proper look-out might have saved the plaintiff. My view is largely founded on what was elicited in cross-examination. She says she was five minutes standing before the collision. If that were so, the defendant's driver could have avoided the accident. Mr. Lynch states that he made certain requisitions to the Judge. They are not forthcoming, and Mr. Kennedy, the Associate, a most careful official, who has been applied to, cannot put his hand on them. We are not going to speculate on what was in the document in question. I asked Mr. Healy about it, and he says his memory is a blank. We must confine ourselves to the Judge's report. Mr. Lynch at the close of the case, the Judge having put proper questions to the jury, made two requisitions which are immaterial. A third requisition made before the verdict was given—it was decided in *Foundation* v. *Keatinge* (1) that a requisition made before verdict given is in time—reads as follows:—Mr. Lynch asked the Judge to recall the jury, and tell them that "if the driver was negligent before he saw or approached the plaintiff, and if that negligence continued up to the time of the accident, the jury were entitled to find that the continued negligence was the cause of the accident." Now, so far as that requisition referred to the continuing character of the negligence it was right, but the requisition, in my opinion, went too far, because it was consistent with it that the plaintiff asked for a verdict in her favour even if the fact was that she stepped on the roadway, and the defendant turned his head at the same moment. That would be simultaneous negligence. The point is: was there a sufficient interval of time to enable the defendant's driver to avoid the collision?

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(1) 12 P. D., at p. 89.

(2) [1916] A. C. 719.

(3) [1907] 13 Ont. L. R. 423.

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(1) 8 C. B. N. S. 568.

The learned Judge considered that the only negligence was the turning round of the driver's head to get the bread; that that was a final and complete act of negligence by the driver; and that he could not have avoided the consequences of the plaintiff's negligence. He did not appreciate the effect of the driver's continuing negligence with self-created incapacity. His attention was not called to *Loach's Case* (2), and to the fact that the negligence of the defendant could be treated as a continuing cause.

Accordingly, there must be a new trial. The costs of each party will be costs in the cause.

(1) I. R. 9 C. L. 278.

(2) [1916] A. C. 719.

Gordon J.:—

I concur, and only desire to add a few words. I cannot help thinking that there must be some confusion as to the negligence which is involved in the third question.

There is no doubt the jury found there was negligence by both plaintiff and defendant's driver, and, if it had been simultaneous, the case would be in a different position. But as the evidence stands, it is not clear that both acts of negligence occurred at the moment the accident happened. It may be that the continuance of the driver's negligence did not in any way enter into the question as to whether or not he could by exercising reasonable care have avoided the consequences of the plaintiff's negligence, as the jury may have thought that the driver, though guilty of negligence in turning round, could not in any event have seen the plaintiff in time to do anything. But if a defendant, by putting himself in a position in which he could not do anything to avoid an accident, disables himself from doing something which a person exercising reasonable care and keeping a proper look-out could have done to avoid the accident, notwithstanding the negligence of the plaintiff, then I think it would be open to the jury to find that the defendant could have avoided the accident.

We have not the Judge's charge before us, but we have the fact that counsel for the plaintiff directed the Judge's attention to the point after the Judge's charge to the jury, and asked him to explain that if the negligence continued—that is, the same negligence which had begun when the defendant's driver turned round—the jury were entitled to find that the continuing negligence was the cause of the accident. The learned Judge did not accede to this requisition, and he says that he is not sure that he completely understood it; and the inference I draw is that the jury were not in a position fairly and properly to consider what was involved in the third question. Accordingly, I agree that there must be a new trial, and I also agree with my brother Gibson as to costs.

H. J. M'C.

Appeal.
1919.

NEENAN
v.
HOSFORD.

Oct. 28, 29.
Dec. 19.

The defendant appealed to the Court of Appeal (1).

Serjeant Sullivan K.C., *T. M. Healy K.C.*, and *M. Healy*, for the appellant.

Lynch K.C., *Swayne K.C.*, and *Rearden*, for the respondent.

Cur. adv. vult.

SIR JAMES CAMPBELL C.:—

This action was tried on the 14th January of this year before Mr. Justice Pim and a common jury of the City of Dublin. This venue was a neutral one, as both plaintiff and defendant reside in the City of Cork. Apart from the medical evidence on either side as to the nature and extent of the plaintiff's injuries, the substantial evidence as to the accident itself is to be found in the evidence of the plaintiff on the one hand, and that of the defendant's carter, Daniel MacSweeney, on the other. Great George's Street is a thoroughfare in the City of Cork, running at right angles to the Grand Parade, which is a wide and busy street. Upon the 11th March, 1918, the plaintiff, a widow lady, being at the time, as she herself states, an active and healthy woman, and in full possession of all her faculties, both physical and mental, left the Augustinian chapel, which is on the left-hand side of Great George's Street as you approach the Grand Parade, and proceeded to cross to the other side of the street, it being then about 3.15 p.m., and broad daylight. From this stage I will give the subsequent events in her own words: "I stepped off the footpath to cross the street. I stood about one yard outside the kerbstone to let the traffic clear. There was a van standing five or six yards to my left. I was looking to the left, and suddenly I saw a horse up to my face. I had no power to jump; it was too near. I put up my hand. The horse, I think, reared. I was thrown down on my hip, and in the fall my right arm was wrenched. The wheel of the cart went over my left leg. I was quite dazed." Upon cross-examination she said: "I do not know if I looked up and down the street before going out on the road. I may have been standing in the street for five minutes. I told Hosford that I was going to a graveyard, and was waiting for a friend. I further told him that I had left the kerb, but that there were cars in front that prevented me crossing. It was then the wheel of the car struck me. I stood two or three minutes in the street, off the kerb, and I was watching the traffic going up from the left."

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(1) In the Court of Appeal, before SIR JAMES CAMPBELL C., and RONAN and O'CONNOR L.JJ.

I now turn to the evidence of the carter, Daniel MacSweeney, who said: "I will be seventeen years of age next June. I had been driving the cart for about seven months before the accident took place. The pony was an old pony of sixteen or seventeen years. The van was packed with bread. I was going down George's Street on the left-hand side. I had turned out of North Main Street. I saw nothing ahead of me at the Augustinian church. There was a loaf of bread falling out of the front window. I turned round for a few seconds to fix the loaf, and when I turned back I saw the woman. She was too near the van for me to pull up. The left shaft struck her. There was nothing between me and the chapel. At the time she was struck I was about two doors away from the chapel, which I had not passed. When I turned to push back the loaf, I was about ten yards from the place where the accident occurred. I was going slowly, perhaps about five miles an hour. I went into O'Sullivan and Howard's. I heard her make no statement. I made a statement myself, the same as I am making now. If I had seen the woman, I could have avoided her. She was apparently walking slowly." Upon cross-examination he states: "The van was a kind of a float. I was sitting on the shaft. The window was in front of the van. The loaves were falling out, and I could not shut the window. I had to put the loaves back."

The evidence of this witness to the effect that the account of the accident which he gave immediately afterwards in O'Sullivan and Howard's was the same as that which he gave at the trial is corroborated by two witnesses—one, Sergeant Patterson, of the Royal Irish Constabulary, who was a witness for the plaintiff, but proved that the boy said in Howard's shop that "he was engaged at the time of the accident in closing the window of the van, and did not see the woman till the pony was up to her"; that he did his best to pull up, but she was knocked down before he could stop him; and the other, the defendant, who proved that on this occasion in the shop MacSweeney repeated exactly what he had said in the witness-chair: "that there was no one in the street when I turned to put in the bread. I saw her just as the pony hit her." This witness also proved that on this same occasion the plaintiff told him she left the footpath without looking, and did not see anything until she was knocked down; that it was partly her own fault. He added that she repeated this statement to him on a subsequent occasion. We have been asked to assume from this evidence, first, that the loaves of bread were streaming out of the small aperture or window in the front of the van, presumably with a view of suggesting that the process of replacing them occupied more than the few seconds sworn to by the carter; and, second, that he must be taken to have seen the plaintiff before the moment of the accident, inasmuch as he said that the plaintiff was apparently walking slowly. In my opinion, these criticisms, to which no cross-examination was directed, are unfounded and in opposition to the uncontradicted evidence of the witness. The van was enclosed or sheeted in on all sides, there being a small square aperture or window in the sheeting of the front for ventilation purposes. The bread is not usually stored inside in single loaves, but in rows or batches of connected loaves; and I would infer that the end loaf of one of these rows was protruding through the aperture, but, whether it was one loaf or more, single or connected, the evidence of the carter is precise that it took him only a few seconds to adjust it or them. Again, if there is anything clear from the case it is that MacSweeney's statement from first to last was that he did not see the plaintiff at all until the moment she was struck, and that then there was nothing he could do to save her. Sergeant Patterson and the defendant, as I have shown, expressly corroborate him in this, and, in the light of this consistent and persistent denial on the part of the carter, I cannot interpret his statement, that the plaintiff was apparently walking slowly, as an admission by him that he saw her at an earlier stage and in time to prevent the accident. Coupled with his previous statements and his evidence at the trial, the jury might, and, as I think, most properly did, construe his evidence as meaning, "I was unable to avoid the accident, as I did not see the plaintiff until the van struck her. At that moment she seemed to me to be walking slowly." At the close of the case Pim J. left the following questions to the jury:—

1. Was the driver guilty of negligence in driving the van on the 11th March, 1918? Answer, "Yes."

2. Was the plaintiff guilty of contributory negligence? Answer, "Yes."

3. Could the defendant by the exercise of reasonable care have avoided the consequences of the plaintiff's negligence? Answer, "No."

4. Assess damages. No answer.

I shall deal later with the form and effect of these questions, and with the objections and requisitions of the plaintiff's counsel; but for the present I merely remark that they are the questions usually submitted for the determination of the issue in the circumstances in evidence in this particular case.

It is plain from the answers of the jury that they accepted substantially the driver's account of the way in which the accident happened, and which I may summarize thus:—The horse and van were proceeding down George's Street, on the proper side of the road, and at a reasonable rate of speed. There was nothing vicious in the animal, and no defect in the van, but at a point which, on the unchallenged evidence, was about ten yards from where the accident occurred, the driver turned round to push back a loaf that was protruding through the window. At that moment there was no obstacle, either pedestrian or vehicle, in front of him; but after the van had traversed the ten yards he turns round to find the van in the act of striking the plaintiff. She admittedly had left the safety of the footpath at some moment before, and neither when leaving the footpath nor while halting on the street did she ever look in the direction from which the traffic would be approaching the very spot on which she stood, but concentrated her gaze and attention upon the traffic passing from the opposite direction, and on the other side of the street. This traffic seems from her statement after the accident to her own witness, Sergeant Patterson, to have been one single vehicle; and if this was all that delayed her in crossing the street,

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a few seconds would account for it, and this strengthens the inference that she had not left the footway at the moment when the carter turned round to adjust the loaf. George's Street, though at times a busy thoroughfare, would seem upon this particular afternoon to have been comparatively free from traffic, as the defendant's was the only moving vehicle on his side of the street; and the fact that no witness to the accident was produced, save plaintiff and the driver, suggests that the traffic on the other side, coming from the opposite direction, was also small.

Upon these facts the findings of the jury could not be challenged, unless there was some misdirection on the part of the Judge. In this connexion Mr. Lynch K.C. complains that Pim J. did not comply with his request to recall the jury and tell them that if the driver was negligent before he saw or approached the plaintiff, and if that negligence continued up to the time of the accident, the jury were entitled to find that the continued negligence was the cause of the accident. It will be noticed that this requisition is in no way based upon the suggestion that was made in the course of the argument, namely, that there was evidence that the carter saw the plaintiff in the street when he was still ten yards away, and before he turned round—a suggestion which I have already pointed out was entirely contrary to the evidence in the case. The Judge reports that so far as he understood the requisition it was not good law; and he has since informed the Court, in reply to a question, that the case of *British Columbia Electric Railway Company* v. *Loach* (1), upon which, as Mr. Lynch has told us, he based his requisition, was not cited before him, but that, having since considered it, he does not think it applied, nor would it have affected his ruling. I must add that, in my opinion, it was the duty of counsel, in fairness to the Judge, to have brought this authority to his notice at the trial if he relied upon it as supporting his requisition; but I am satisfied that Pim J. was right in his ruling that this doctrine of continuing negligence had no application to the facts of this case.

In *British Columbia Electric Railway Company* v. *Loach* (1) the deceased was being driven in a wagon by another man, who

(1) [1916] 1 A. C. 719.

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proceeded to cross the track of the defendant's electric railway close to a station, with the result that an electric car crashed into the wagon and killed the deceased. The jury found that the defendants were negligent in approaching the station at an excessive speed, and that the deceased was negligent in not taking extraordinary precautions to see that the road was clear, and that the defendants could have prevented the accident by stopping their car in time had the brake been in effective condition. There was evidence that the brake was defective, and the driver of the wagon proved that while the electric car was still fifty yards away the deceased man shouted a warning of its approach, but that it was then too late to get the wagon out of danger. Two propositions were submitted on behalf of the defendants, and the manner in which they were dealt with by Lord Sumner deserves the closest attention. The first of these was that the negligence relied on as an answer to contributory negligence must be a new negligence, the initial negligence which founded the new negligence being spent and disposed of by the contributory negligence; and, second, that if the defendant's negligence continued up to the moment of the collision, so did the deceased's contributory negligence, and that this series, so to speak, of replications and rebutters finally merged in the accident without the deceased ever having been freed from the legal consequence of his own negligence having contributed to it. Lord Sumner first deals with the latter of these propositions, and what I desire to emphasize is that, while it accurately corresponds with the facts of this case, he in no way dissents from its soundness, but says that it fails because it does not correspond with the facts before him, as on the evidence *the contributory negligence of the deceased was spent while the electric car was still fifty yards away*, and capable of being stopped by an effective brake. This cardinal fact of the negligence of the deceased having spent itself in time to enable the driver, had the car been provided with a working brake, to prevent the accident, is the key to the decision, as the negligence of deceased being exhausted, could not be ultimate, the default in providing a proper brake being the later and ultimate cause. Now, if there is anything which is beyond doubt in the present case, it is that the plaintiff's contributory negligence, in standing

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on the street, be it for five minutes, two minutes, or so many seconds, without ever once looking in the direction from which the traffic might be expected to approach the spot in which she was standing, was not spent, but continued up to the very last moment of the collision. No words could establish this more clearly than her own: "I was looking to the left, and suddenly I saw a car up to my face." In my opinion this disposes of her case, as it is conclusive that up to the last moment before the impact she could by the exercise of ordinary care have avoided the consequences of the driver's negligence, which in no sense was more continuing than her own. Lord Sumner then deals with the first proposition, and points out that the negligence which may be an answer to the contributory negligence of the injured party is not necessarily some new default arising subsequent to the original negligence of the defendant, but may be either some other default, such as that relating to the brake, which, though in existence throughout, only became operative at the stage when, were it not for its existence, the defendant could have prevented the accident, or it may be the original negligence if it in fact continued so as to be the ultimate negligence causing the accident. To me it is plain that at the base of this reasoning by Lord Sumner was again the assumption that the negligence of the injured party had ceased before the collision, and was therefore not ultimate in the same sense as that of the defendant, for he adds: "If the same conduct which constituted the primary negligence is repeated or continued, and is the reason why the defendant does not avoid the consequence of the plaintiff's negligence at and after the time when the duty to do so arises, why should it not be also the 'ultimate' negligence which makes the defendant liable?" And later on, when he comes to apply this proposition to the case before him, he says that the defendants could have avoided the original negligence of the deceased and failed to do so, not by any combination of negligence on his part with their own, but solely by sending out a car with an ineffective brake.

Gibson J. had a similar qualification present to his mind in this case, for he says that Mr. Lynch's requisition has no application to a case of simultaneous negligence; and in an earlier passage in his judgment he says: "It is clear—and in this I agree with Mr. Healy's contention—that if at the moment the driver turned his head the plaintiff stepped out, she would have had no cause of action; the negligence of each would have been simultaneous. . . . I have had much doubt on this branch of the case, but on the whole I agree with the plaintiff's counsel that on the evidence the jury might infer that the defendant, who was in the wrong in turning his head around and thereby negligent, if he had kept a proper look-out might have saved the plaintiff." In the first place, my comment on this statement is that on the evidence the jury not only might but ought to have inferred, as it was admitted, that the plaintiff was in the wrong by never once looking to the right, and that if she had done so at any moment up to the actual collision she could have avoided the accident. Next, his assumption that the carter might have seen the plaintiff at the time he turned his head to protect the loaves is based on a mistaken view of the evidence of the plaintiff when he states that she proved on cross-examination that she was standing in the street for five minutes. What she did say was that she might have stood for five minutes, but almost in the next sentence she states that in fact the time was two or three minutes. I have already suggested that the fair and reasonable inference from the evidence as a whole is that she had not left the footpath at the moment the driver turned his head; but at least I am entitled to say that the evidence was equally consistent with this as with the opposite inference, and since, as Palles C.B. points out in *Coyle* v. *Great Northern Railway Company* (1), the onus of proof that the defendant could have avoided the consequences of her negligence rested on the plaintiff, she failed to discharge it. Even if we assume in her favour that she was standing on the road at the moment when the driver turned his head, this fact would establish that her negligence was existing before that of the carter commenced, and, as it admittedly continued until the end, it was at least coextensive with his, and by its continuing character incapacitated her from avoiding the accident. I find even greater difficulty in following the reasoning of Gordon J. when he says: If the negligence of the plaintiff and defendant "had been simultaneous, the case would be in a different position; but as the evidence stands it is not clear that both acts of negligence occurred at the moment the accident happened." Now, not only is it clear that the negligence of each did not occur at the moment of the accident, but while the negligence of the plaintiff was simultaneous with that of the carter in the sense that its duration coincided with his, it differed from his in starting at an earlier period. But this fact, once it is admitted that her negligence continued to the end, that she could, therefore, throughout have avoided the accident, cannot raise any equity in her favour. Cases of injury to a pedestrian lying drunk or incapable on the street or of an animal on the road with its feet fettered, as in *Davies* v. *Mann* (1), have no application to a plaintiff who from the first stage to the last could have avoided the accident by stepping a few feet in any direction. Even in *Gaffney* v. *Dublin United Tramways Company* (2), in which Ronan L.J. deals so elaborately with this branch of the law, I doubt if sufficient consideration was given to this particular aspect of the case, as, in my opinion, where it is clear upon the facts that plaintiff and defendant were guilty of simultaneous negligence, so that either could up to the last have avoided the consequences of the negligence of the other, the plaintiff must fail, unless the original negligence of the defendant was some act or default on his part producing continuing incapacity to exercise ordinary care, as, for example, in the case of a drunken and incapable driver of a vehicle. But I cannot base such a doctrine in the case of a competent and sober driver, who is driving on his proper side and at a reasonable speed, upon the mere fact that he turned his head for a few seconds to hail a passer-by or to secure a shifting piece of luggage of a passenger or a loaf in his van.

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(1) 20 L. R. Ir. 409.

I know of no case, and none has been cited, in which a defendant has been held liable in such circumstances, where contributory negligence on the part of the plaintiff has been proved or is admitted, while there are many familiar authorities which are inconsistent with it. The case of *Davey* v. *London and South-Western Railway Co.* (3) is a leading illustration of an a fortiori kind, because in it the plaintiff was non-suited on the precise ground that he was guilty of contributory negligence, continuing to the last, and in the absence of which he could have avoided the consequences of the defendant's negligence. Ronan L.J. has suggested that this decision was subsequently dissented from, but the nature of this dissent is fully explained by Palles C.B. in *Coyle's Case* (1), in which he points out that it in no way affected the principle I have mentioned, and that it had been followed and approved by overwhelming authority. Palles C.B. adopted it himself in *Coyle's Case* (1), and in the subsequent case of *Curtin* v. *Great Southern and Western Railway Co.* (2) it was also applied by the Court of Appeal. Since then it has been cited in this connexion on several occasions in the House of Lords, as, for example, by Lord Atkinson in *M'Alpine's Case* (3). In the *Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery* (4) it seems plain, from the judgment of Lord Cairns, that had the accident in that case occurred in daylight he would have agreed with the minority in non-suiting the plaintiff, and thereby converted the minority of three into a majority of four. In all these cases it was held that the failure by the owner of the engine to signal his approach to a level crossing by the whistle was not sufficient evidence of negligence by itself to entitle a plaintiff to have the case submitted to a jury when the time was daylight, and the plaintiff could, had he looked, have had a clear and uninterrupted view of the approaching train at a distance sufficient to enable him, with reasonable care, to get out of the path of danger; and, I presume, the position of the plaintiff in this respect could not be altered in his favour by proof that the failure to whistle was due, not to the omission of the driver, but to the default of the defendants themselves in sending out an engine which either had no whistle, or had one which was inefficient.

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(1) 10 M. & W. 546.

(2) [1916] 2 I. R. 472.

(3) L. R. 12 Q. B. D. 70.

It is said that this principle has been modified in the case of street traffic, and this is true to the extent that owing to the greater control that drivers of street vehicles have over them as compared with locomotives running on fixed rails a higher standard of duty and care is exacted from them, more especially in favour of the blind, the halt, and the maimed, persons advanced in years, and children of tender years. But even the

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(1) 20 L. R. Ir. 409.
(2) 22 L. R. Ir. 219.
(3) [1913] A. C. 838.
(4) 3 App. Cas. 1155.

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youngest child may be deprived of remedy if the negligence of his custodian has contributed to the accident: *Waite* v. *North-Eastern Railway Co.* (1); and the same applies to the blind and maimed if they recklessly expose themselves to danger, and where, as in the present case, the injured person is in full health and activity, with his senses unimpaired, I know of no authority which absolves him once it is established that he could up to the last moment have by ordinary care prevented the accident; and there are undoubtedly many cases which hold to the contrary. I wish specially to refer to *Cotton* v. *Wood* (2), because its authority, so far as I know, has never been questioned, and it lays down, upon facts very closely resembling those in the present case, the propositions which I have ventured to affirm. In that case the wife of the plaintiff, in company with another woman, proceeded to cross a crowded thoroughfare, but not at an ordinary crossing-place. The evening was dark, and snow was falling, and after she had crossed in front of the defendant's omnibus she became alarmed by the approach of another vehicle from the opposite direction, and turning back was knocked down and killed by the omnibus. This vehicle was on its right side, and going at a reasonable pace, but it was proved that the driver saw the woman cross in front of his horses, and that at the time she turned back he was speaking to the conductor, his head being turned round for the purpose, so that he did not become aware of her danger until it was too late to avert the mischief. The Judge at the trial non-suited the plaintiff on the ground that there was no evidence of actionable negligence, and his ruling was approved in the Common Pleas, without calling on the defendant's counsel. In giving judgment Erle C.J. says: "It is as much the duty of a foot-passenger attempting to cross a street or road to look out for passing vehicles as it is the duty of drivers to see that they do not run over foot-passengers. Where it is a perfectly even balance upon the evidence whether the injury complained of has resulted from the want of proper care on the one side or on the other, the party who founds his claim upon the imputation of negligence fails to establish his case. . . . One of the plaintiff's witnesses stated that the driver was looking round at the

(1) E. B. & E. 7[illegible]8.

(2) 8 C. B. N. S. 568.

time to speak to the conductor. That alone clearly would be no affirmative proof of negligence. The man was driving on his proper side, and I do not find it imputed to him that he was driving at an improper pace. As far as the evidence goes, there appears to me just as much reason for saying that the plaintiff's wife came negligently into collision with the defendant's horses and omnibus as for saying that the collision was the result of negligence of the defendant's servant."

If we contrast the evidence as to the alleged negligence of the driver in that case with that of the carter in the present case, it seems to me that the attempt to apply the doctrine of continuing negligence might with even greater force have been there made. He had, as it is said, incapacitated himself from keeping a look-out, after he had seen the woman, then only from three to seven yards away from him, in a position of possible danger, by turning his head to speak to the conductor, and did not turn round again until it was too late to prevent the accident; whereas in the present case it was daylight, and even assuming that the carter could have seen the plaintiff when ten yards away, was it negligence on his part to assume that she would have passed on before he would reach her, and is the act of turning round, which Erle C.J. said in *Cotton's Case* (1) was clearly no proof of affirmative negligence, to be treated in this case as not only affirmative negligence, but as disabling the defendant from relying on the negligence of the plaintiff? If, on the other hand, the reasonable inference from the evidence is, as in my opinion it is, that the carter did not and could not have seen the plaintiff standing on the street at the moment he turned his head, or, if the plaintiff has failed, as in my opinion she did, to discharge the onus of proof in this respect, then the whole case for continuing negligence falls to the ground.

In truth the attempt to apply the principle of the decision in *Loach's Case* (2) to the facts of the case before us is an apt illustration of what Holmes J. in *Smith* v. *Browne* (3) describes as a most fruitful source of fallacy: the effort to apply the language of a Court or Judge in laying down in the case before it or him that a particular act or omission amounts to negligence to a similar act

(1) 8 C. B. N. S. 568. (2) [1916] 1 A. C. 719. (3) 28 L. R. Ir. 1.

or omission occurring in other circumstances and under different conditions. Notwithstanding this warning, the case itself and certain passages from the judgment of Holmes J. have been relied upon, as they were in *Gaffney's Case* (1), as laying down principles of universal application to street accidents. The jury in *Smith* v. *Browne* (2) had found negligence on the part of the driver, but had absolved the plaintiff of contributory negligence, and it was sought to set aside this latter finding as against the weight of evidence. The Court was plainly of opinion that there was evidence of contributory negligence on the part of the plaintiff, but was also satisfied that there was evidence upon which the jury might reasonably come to the conclusion that the defendant by the exercise of reasonable care might have avoided the consequences of the plaintiff's negligence. This issue was not directly raised in the pleadings, nor was it submitted as a question to be answered by the jury; but, as Gibson J. points out, it was the point upon which the case for the jury was mainly put, and the Judge directed them upon it. It was proved that the defendant, seeing the plaintiff, a pedestrian, in a position of danger upon an unfrequented street in Tralee, shouted to him, but the plaintiff was deaf and did not hear the shout. The defendant, who was then some yards away, continued to drive on, and knocked down the plaintiff, and it was held that the jury upon these facts might reasonably conclude that the defendant when he saw that his warning was unheeded had time and opportunity to pull up and thus avert the accident. But in the present case the carter had no such opportunity, while the plaintiff was not suffering from deafness or other infirmity. I have assumed for the purpose of my judgment in this case that there was evidence upon which the jury could reasonably find, as they did, that the driver was negligent, though I think that if the jury had found the other way, or if Pim J. had directed for the defendant on this issue, neither the finding nor the direction could have been successfully challenged. The sole and only allegation of negligence on the part of the driver was the fact of his turning his head for a few seconds of time to discharge his duty to his employer, and a similar act in *Cotton* v. *Wood* (3) was held by

(1) [1916] 2 I. R. 442. (2) 28 L. R. Ir. 1. (3) 8 C. B. N. S. 568.

the Court to be no evidence of negligence. I am forbidden by the Judicature Act to disturb the verdict of a jury on the ground of misdirection, unless I am of opinion that some substantial wrong or miscarriage has been thereby occasioned in the trial of the action. It is admitted that all the available evidence was forthcoming at the trial, and even if I thought, which I do not, that Pim J. was wrong in his view that the doctrine of continuing negligence had no application to the facts of this case, I am satisfied that no substantial wrong or miscarriage thereby resulted, inasmuch as the plaintiff had failed to discharge the onus of proof in respect of it, or at least that drawing reasonable inferences of fact, as I am entitled to do upon this motion, a finding in her favour upon it would have been against the weight of evidence. I cannot part from this case without expressing myself in entire agreement with Lord Sumner in *Loach's Case* (1), where he says:—"It is surprising how many epithets eminent Judges have applied to the cause, which has to be ascertained for this judicial purpose of determining liability, and how many more to other acts and incidents, which for this purpose are not the cause at all, 'efficient or effective cause,' 'real cause,' 'proximate cause,' 'direct cause,' 'decisive cause,' 'immediate cause,' 'causa causans,' on the one hand, as against, on the other, 'causa sine qua non,' 'occasional cause,' 'remote cause, 'contributory cause,' 'inducing cause,' 'condition,' and so on. No doubt in the particular cases in which they occur they were thought to be useful, or they would not have been used, but the repetition of terms without examination in other cases has often led to confusion, and it might be better, after pointing out that the inquiry is an investigation into responsibility, to be content with speaking of the cause of injury simply and without qualification."

I can testify from a long experience in actions of this kind that even the approved formula—could the defendant by the exercise of reasonable care have avoided the consequences of the plaintiff's negligence?—has been responsible for many unreasonable verdicts in cases in which it was equally plain upon the evidence, though no question upon it was submitted to the jury, that the plaintiff on his part could also by the exercise of reasonable care have avoided the consequences of the defendant's negligence. Formerly it was the practice with some Judges to submit this question in preference to the other, while in some cases both were submitted; but in recent years it has been the practice to submit the latter question only, with the result in many cases of providing a sympathetic jury with a tempting opportunity for disposing of the case in favour of the plaintiff. If Judges are to complicate still further their difficult task of directing the jury as to contributory negligence by formulating questions as to continuing negligence, or as to either or both of the parties having incapacitated himself from obviating the negligence of the other, I fear confusion must become worse confounded. However useful such formulae may be to the Judge as bringing to his mind at the trial the appropriate subjects for direction, they are calculated when thus submitted to a jury to leave them in a state of perplexity and doubt. The late Lord O'Brien, with his great experience both on the Bench and at the Bar, has borne similar testimony in *Butterly* v. *Drogheda Corporation* (1); and he propounded the following as the most suitable form of the questions to be submitted to the jury:—1. Has the defendant been guilty of negligence? 2. If so, was the defendant's negligence the real, direct, and immediate cause of the occurrence? I fear that these questions are faulty in two respects—first, in not raising directly the issue of the plaintiff's negligence; and, second, by the introduction of the words "real, direct, and immediate," at the risk of the confusion indicated by Lord Sumner. I put forward, though with diffidence, my own view as to the appropriate questions, namely—1. Was the defendant negligent? 2. Was the plaintiff (or the injured person as the case may be) negligent? 3. If you find that both were negligent, could each up to the last moment have avoided the accident by the exercise of ordinary care? 4. If not, could either of them, and, if so, which?

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(1) [1916] 1 A. C. 719.

After O'Connor L.J. had delivered his judgment, the Lord Chancellor said that, in view of the minute calculations as to time and distance upon which Ronan L.J. had entered for the purpose of discrediting the evidence of the carter as to the precise point in

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(1) [1907] 2 I. R. 134.

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Great George's Street at which the accident occurred and its distance from the place at which he turned his head, he thought it only fair to this witness to state that his evidence upon these points had not been contradicted or impeached at the trial by cross-examination or otherwise. It was also plain from the judgments that it had not been impeached in the Court below, and it certainly was not challenged in the argument on this appeal; but, on the contrary, counsel for the plaintiff admitted it had been given with the utmost candour, while it is certain that it was accepted by the jury.

Ronan L.J.:—

The accident in this case took place in a street in Cork whose name has recently been changed from Great George's Street to Washington Street. Serjeant Sullivan told us the street is one of the most important in the south of Ireland, as it forms the main western outlet from the city. It is forty feet wide from kerb to kerb, and has no crossing-place for foot-passengers. The facts of the case are simple. The plaintiff in attempting to cross this street was knocked down and injured by a van driven by the defendant's servant, which she did not see until it struck her. She could have seen it if she had taken care to look out. The vandriver never saw her until just as he struck her, and when it was impossible to avoid doing so. The question is whether the defendant is liable in an action. I should have thought that since the final abolition of the old fiction that the defendant's negligence must be the sole cause of the collision the question was a simple one; that her negligence did not justify him in knocking her down if by reasonable care he could have avoided it. Of course, if he was prevented from being able to avoid it by her conduct or by other causes for which he was not responsible, he would not be liable. There was ample evidence in the case that if he had kept a reasonable look-out he could have seen her in time to avoid, and have avoided, the accident. But notwithstanding this the defendant has obtained judgment. This can only be based on the other findings of the jury, viz.—1, her negligence, which was admitted; and 2, that he could not have avoided the collision when he saw her, which was also practically admitted, the plaintiff's only real

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case being that the defendant's negligence consisted in having done nothing to avoid the collision until it became impossible to do so. Negligence is a breach of duty. Is there a duty to take reasonable steps to avoid driving a car against a person? If so, when does this duty to take active steps arise? Obviously when they become prudent, a fortiori when they become necessary, and certainly before they have become useless or impossible. Let us assume that a careful, prudent man in the present case had seen the plaintiff some distance off, and that when he came within thirty yards he saw that to avoid risk he ought either to pull up or divert his course, the obligation to do so would arise then; and if a collision occurred through his failing to do so in time to avoid the collision, this would be actionable negligence. If through negligence he had failed to see the plaintiff until the collision, would this negligence have relieved him from the obligation and duty to take the steps; or is it the law that a man driving down an important street can take a book and read it and keep no look-out, on the principle that "prudent people can and will take care of themselves; if they don't, I can knock them down with impunity provided I don't see them"? Surely the law is not so. Where there is duty to take steps to avoid danger to others, is it not almost a common form to say, "The duty arises when the party has seen or ought to have seen the necessity for doing so"?

In the case I have put the risk arose at thirty yards. This in no way depended on the defendant's seeing the plaintiff. The risk to her arose then in fact, whether the defendant was aware of it or not. If he was unaware of the risk by reason of his own negligence in not looking before him, does this negligence place him in a better position as regards the plaintiff than he would have been if he had done his duty and seen her? Look-out is at least as important in street traffic as it is at sea. An attempt in the Admiralty Court to excuse the omission to take steps to avoid an impending risk of collision on the ground that the party kept no proper look-out, would be received with derision by everyone.

It is plain on the case that the driver could not have avoided the accident after he saw the plaintiff, and the jury fully recognized this, as is shown by the last finding. The only evidence of negligence was his not taking steps to avoid the accident. If there was no duty on him to take such steps before he saw her, there was no evidence of any breach of duty by him, and therefore no evidence of negligence in the case, and the defendant was entitled to a direction at the close of the plaintiff's case, and at the close of the entire case. But if this was so, neither was there any breach of duty or negligence on the part of the plaintiff, for she never saw the vehicle until she was struck, and her sole negligence was in not having seen it. So that, if this principle is correct, there was no evidence of negligence causing the injury on the part of either plaintiff or defendant. As there was nothing to prevent either seeing the other in time to avoid the collision, this result seems to me a reductio ad absurdum.

I shall now refer to the evidence, as there are facts of great importance, in my opinion, to which the Lord Chancellor has not referred.

The Judge reports thus: "Civil engineer proves the maps in the case, showing where the accident took place, and the various distances." The Judge has not stated the distances proved by the engineer. In fact, they are not stated. The map does not mention the distances, but it is drawn to scale. I have scaled it with the utmost care, and the figures I give are, I think, correct. There was no question as to its accuracy so far as it describes the place, but as to the positions of the plaintiff and the standing van, of course it only represents her evidence. The distances are very important in the case, and the map practically is the only means we have of testing the statements of the plaintiff and the driver. But it must be remembered, especially considering the evidence of the plaintiff, that the appellant's counsel in opening the appeal said that there was no imputation on her veracity. There is, therefore, no suggestion that she has invented or wilfully misrepresented anything. This will be found very material.

The case is very peculiar in this respect. The only witnesses as to the facts of the collision are the plaintiff and the boy driver, and neither attempts to speak of the acts of the other, as they did not see each other until, as the boy stated, "just as the pony struck her." However, the plaintiff is clear that she was standing

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and had been standing for some time where she was struck. I think the evidence proves beyond doubt—1. In the driver's words, "If I had seen the woman, I could have avoided her." 2. "I had turned out of the main street. I saw nothing ahead of me at the church. There was no one in the street when I turned to put in the bread." This establishes that there was nothing to prevent his seeing the plaintiff if she was standing in the roadway. Her evidence is that she was standing at the place where she was struck for two or three minutes. The distance from the corner of the main street to where she was struck is eighty yards at most. The driver puts the speed at five miles an hour. Plaintiff's counsel takes that as ten yards in four seconds; that would be eighty yards in thirty-two seconds, forty in sixteen seconds, twenty in eight seconds. There is no suggestion that there was anything to interrupt his view. 3. This establishes beyond doubt that if there is any truth in the plaintiff's evidence, the driver, if he had locked before him, could have seen her in ample time to avoid the accident. I am therefore of opinion that there was clear evidence to go to the jury—1. That the driver could have seen the plaintiff from the time he turned the corner. 2. A fortiori in ample time to avoid the accident. 3. That, notwithstanding her negligence, he could by reasonable care in looking before him have avoided the accident. 4. If necessary, that the jury were at liberty to find that, if he had seen the plaintiff during the time his back was turned, he could have avoided the accident.

The curious state of things in this case is that all these matters were open to the jury on the first question, and we have their finding. But they were all withdrawn from them on the third question by the direction confining it to what happened when it was impossible to avoid the collision, i.e., when he actually saw the plaintiff.

The Lord Chancellor has stated the questions left to the jury, with their findings. In these findings (1 and 2) negligence must be taken "in its proper sense," not negligence in the abstract, but negligence causing or contributing to the injury—what Lord Cairns calls an "incuria dans locum injuriae." I asked Serjeant Sullivan early in the argument if the first finding was to be taken in this sense. He said, "Yes." To prevent mistake,

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at the end of the argument I intimated to him that I thought it a very serious element in the case, and I put the question in Lord Watson's words in *Wakelin's Case* (1): was it a finding "of negligence which materially contributed to the injury"? He agreed that it was. It follows, of course—and he saw this—that the same rule must apply to the finding of the plaintiff's negligence, on which his case to a great extent rested. There was no attempt to impeach either of those findings. They establish the proposition that the accident was not caused in fact by the sole negligence of the plaintiff, but was the result of the negligence of both plaintiff and the driver.

What was the negligence found by the jury in No. 1? As it materially contributed to the accident, it must have happened before the accident became inevitable, i.e., before the defendant saw the plaintiff. It can only have been negligence in not having taken steps to avoid the accident at some period when the accident was avoidable, i.e., before he saw her. In plain English, it means "if he had kept a proper look-out he could have avoided the accident, and his not having done so was negligence." It cannot have meant anything else; and, in my opinion, the second finding as to the plaintiff's negligence meant the same thing. The poor woman admitted her fault in terms to Hosford. Pim J. must have explained to the jury that "contributory negligence" in the question meant negligence which contributed to the accident. If the duty to take steps to avoid the accident only arose when each saw the other, both findings should have been in the negative. The acquiescence of all parties in these findings satisfies me that no one dreamed at the trial of suggesting that the duty of each did not arise until he or she saw the other; and the course of the trial and of the arguments in the King's Bench Division and in this Court satisfies me that no one at any stage thought of suggesting that the defendant was entitled to a direction, and that there was no question for the jury. At one time this finding No. 2 would have been an answer to the action. I endeavoured in *Gaffney's Case* (2) to show the legal devices by which this principle of the sole cause being the defendant's negligence was abolished, but the old phrase was continued. Indeed, in *Gaffney's Case* (2) Palles C.B.'s

(1) 12 A.C. 41.

(2) [1916] 2 I. R. 472.

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judgment contained statements very like the old rule, and I was very much troubled when I thought I was differing from him. I was glad to find that so far back as 1887 he was of opinion that the old rule, that the plaintiff must show that the accident was produced solely by the defendant's negligence, had been abolished. He says, in *Coyle* v. *Great Northern Railway Company* (1), at p. 426, referring to Lord Esher's judgment in *Davey* v. *London and South-Western Railway Company* (2): "As this judgment has been the subject-matter of a good deal of criticism, it is right to observe that although Lord Esher does in its commencement state that it is for the plaintiff to show that the accident was produced solely by the plaintiff's negligence—in this sense that he himself was not guilty of any negligence which contributed to the accident (a proposition which has since been disaffirmed by the House of Lords)—he does not seem to have made it the ground of his decision, which is that the negligence of the deceased was one of the contributory causes of the accident. The judgment of Lord Justice Bowen . . ., every word of which I am prepared to adopt, in no way refers to or is based upon that erroneous opinion of the Master of the Rolls." At p. 521 of the report in *Gaffney's Case* (3) I quoted Lord Watson and Lord Blackburn's judgments in *Wakelin's Case* (4). I added: "This was in 1886. How the 'sole cause' can be insisted on after this, or how it can be said that the fact that the defendant's negligence only formed part of the cause amounted to a verdict for the defendant, I find it difficult to see." I unfortunately had not noticed the passage in *Coyle's Case* (1) and the Lord Chief Baron's emphatic statement as to the effect of *Wakelin's Case* (4), and his equally emphatic repudiation of the statement of the law by Lord Esher. It would have relieved me of much anxiety in the case. *Davey's Case* (2) was decided by Lord Esher M.R., Bowen and Baggally LL.J., the latter dissenting. Lord Esher's was the decisive judgment. It may be said, however, that the judgment of the Lord Chief Baron only quarrels with a portion of his judgment. Let us read further down the page: "In reference to it [*Davey's Case*] (2) he [Lord Esher] is reported to have said: 'If it pleases

(1) 20 L. R. Ir. 409.
(2) 12 Q. B. D. 70.
(3) [1916] 2 I. R. 472.
(4) 12 A. C. 41.

anyone to hear it, I have doubted ever since I gave that judgment whether my brother Bagallay and my brother Manisty were not more right than we were. I have doubted whether even in that case we ought to have taken it from the jury.'" That is, that he thought he should have decided the other way. If he had, the decision would have been the other way. Mr. Beven, who was present in Court, gives an account of the transaction, vol. i, p. 140.

This statement of the law by Lord Esher in *Davey's Case* (1), if correct, would have made the answers to questions 1 and 2 in this case a clear verdict for defendant; 2 would have been a complete defence if he was right; and 2 was fully proved by the plaintiff herself. It therefore goes to the root of this case. But assuming it, as the Lord Chief Baron says, to have been subsequently decided to be wrong by the House of Lords, what was the position? It is clear from *Wakelin's Case* (2) that once question 1 was found for the plaintiff in the sense I have explained, the only defence open was contributory negligence. On this the judgment of Lord Watson, adopted by Lord Blackburn, is clear: "I am of opinion that the onus of proving affirmatively that there was contributory negligence on the part of the person injured rests, in the first instance, upon the defendants, and that, in the absence of evidence tending to that conclusion, the plaintiff is not bound to prove the negative to entitle her to a verdict."

The notice of motion in this case specifies three grounds for setting aside the verdict: 1, misdirection and non-direction. This is subdivided into (*a*), (*b*), (*c*), and (*d*). Of these (*b*) is the important part. [His Lordship read (*b*), see ante, p. 262.]

It is quite clear on the evidence that the driver first saw the plaintiff "when the driver turned round after pushing in the loaves." Pim J., in his letter to Mr. de Versan, in reply to the inquiry directed by the Court, says: "I think I told the jury that if they were satisfied that when the driver turned round after pushing in the bread he was unable to avoid the consequences of the defendant's negligence, they should answer 'No' to the third question." This is really the direction complained of in (*b*), but put more forcibly by the learned Judge in his letter. Question 3, accompanied with this direction, really was: "Could the defendant by the exercise of ordinary care, after he had seen the plaintiff, have avoided the consequences of the plaintiff's negligence?" Or, to put it otherwise, if the question was put in the form it was, the answer of the jury only meant, "Not after he had seen her." This goes to the root of the case. It is important also, as it shows that their answer to the first question must have meant that he could have avoided the collision by reasonable care, by taking proper steps before he saw her, and that he was negligent in not having seen her in time to do so. No other negligence can be suggested, and, as I have said, the first finding was not challenged on any ground by counsel for defendant.

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(1) L. R. 12 Q. B. D. 70.

(2) 12 A. C. 41.

This seems to me a vital misdirection on the main issue in the case. The misdirection was not clear from the Judge's report, and the Judges in the King's Bench had not the Judge's letter making it clear. I confess that when we got that letter, I thought there was an end of the case of the appellants, and I confess that, with the proper doubt arising from the opinions of my colleagues, I think so still. I don't exactly know the view my colleagues take of the misdirection. In my opinion it prevented the real question in the case being tried on the third question, and certainly entitles the plaintiff to a new trial. Lord Justice James used to say: "This case is an authority, although I was party to the decision." I would respectfully adopt this language in reference to *Gaffney's Case* (1) and my own relation to it. I shall state later on how far I think it is an authority governing the present case, but I wish to say now that in referring to my own judgment I do so solely, 1, to avoid repeating what I have said there, and 2, as a convenient reference to the authorities I have quoted.

If the plaintiff could not have avoided the accident by ordinary care, her negligence is immaterial. The finding of negligence by her involves the finding that she could have avoided the accident by ordinary care: see the terms of the plea and the statement of the law in the *Grand Trunk Railway* v. *M'Alpine* (2). *Radley* v. *London and North-Western Railway Company* (3):

(1) [1916] 2 I. R. 472. (2) [1913] A. C. 838. (3) 1 A. C. 754.

"If the defendant could by the exercise of ordinary care have avoided the accident, the plaintiff's negligence will not excuse him." Holmes L.J. in *Smith* v. *Browne* (1) thought that this rule applied to street accidents, and expressed it thus: "The negligence of a foot passenger, however great, does not excuse the owner of a vehicle from exercising a reasonable amount of care and skill to prevent its consequences." I should have thought that these propositions were statements of the law. This Court adopted both in *Gaffney's Case* (2). In the present case, however, it was argued that they were only "formulae," and apparently that they should not be applied in the present case. I can only say that I was and still am unable to understand what this argument means, or how one is to ascertain whether what purports to be a statement of the law is such, or is only a formula, whatever that may mean. In *Ellerman* v. *Grayson* (3) the majority of the Court of Appeal, Duke L.J., at p. 531, and Atkin L.J., at p. 537, decided the case on the authority of *Radley's Case* (4). That case only appeared in the Law Reports after the argument in this case.

I think a great deal of confusion on the subject of contributory negligence arises from the expression adopted in the Irish plea and some of the judgments, viz., "avoid the consequences of the plaintiff's negligence." This really means "avoid the accident." The Lord Chancellor pointed out in the argument that the expression, in addition to being confusing, is inaccurate, for in such a case the accident is the result of the negligence of both parties; and, as he, if I may take the liberty of saying so, neatly put it, what the defendant has to avoid is, not the consequences of the plaintiff's negligence, but the accident, which is the consequence of the combined effect of his own and of the plaintiff's negligence, and without both of which it would not have happened. Though used in *Tuff* v. *Warman* (5), this phrase is not used in the most authoritative statements of the law. I shall give some, referring for convenience to the pages of the report of *Gaffney's Case* (2): p. 497, the ruling of Erle J., "have avoided the collision"; p. 499, Lord Campbell, "have avoided the accident"; p. 502, Brett M.R., "have avoided injuring the plaintiff" ; p. 503, Lord Esher, *The Bernina* (1), "have avoided the accident" ; p. 503, Gibson J., "the accident" ; p. 504, Bramwell B., "have avoided doing the mischief." At p. 505 Blackburn J. says: "The question was, could the plaintiff have avoided the consequences of the defendant's negligence?" But he concurred in the House of Lords in reversing this and in stating the rule : "If the defendant could in the result by ordinary care have avoided the mischief which happened." This has since been accepted as the authoritative statement of the law. I wish to emphasize that it is free from the expression "consequences of the plaintiff's negligence," as are the others to which I refer at p. 524 of *Gaffney's Case* (2). Again, in *The Bernina* (1) Lord Lindley, p. 524, "have avoided the injury," and p. 525, "the collision notwithstanding the plaintiff's negligence." This seems to me to be the neatest statement of all, and I shall use it.

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(1) 28 L. R. Ir. 1.
(2) [1916] 2 I. R. 472.
(3) [1919] 2 K. B. 514.
(4) 1 A. C. 754.
(5) 2 C. B. N. S. 740; 5 C. B. N. S. 573.

Contributory negligence is an ambiguous expression. It originally meant simply (A) that the plaintiff was guilty of negligence, and that this negligence in fact so contributed to the accident, that but for her negligence the same would not have happened. When the law was that the plaintiff could not recover unless the defendant's negligence was the sole cause, this would obviously have been a defence to the action. I endeavoured in *Gaffney's Case* (2) to show how the law was altered by fictions, and finally in terms by *Wakelin's Case* (3), and (A) was then no longer a defence. Something more was necessary. What was it? I take it from *Radley's Case* (4), at p. 505 of the report of *Gaffney's Case* (2). And (B) "the defendant could [not] in the result by the exercise of ordinary care and diligence have avoided the mischief [the accident]." Unless (B) was established as well as (A), the plaintiff's negligence was therefore immaterial. But, further, if (A) and (B) were both established, it equally showed that the defendant's negligence in fact, if any, was immaterial if in the result he could not have avoided the accident by reasonable care. The plea disproved the allegation that his negligence caused the accident. In England, prior to the Judicature Act, there was no special plea of contributory negligence. It was proved under the general issue or denial (not guilty) of the defendant's negligence. In Ireland there was a special plea embodying (A) and (B). See pp. 509–510 of the report in *Gaffney's Case* (1). But this is immaterial, as Lord Watson says at p. 47 of *Wakelin's Case* (2). The vital fact is, that when spoken of as a defence in an action of negligence, "contributory negligence" has come to mean (A) and (B), and not (A) alone, as formerly. It follows from this, taking Lord Watson's statement, already quoted, that once the plaintiff has given evidence that the defendant's negligence "caused or materially contributed to the injury," the defendant to succeed must prove contributory negligence, i.e. (A) and (B).

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(1) 12 P. D. 58, at p. 89.
(2) [1916] 2 I. R. 472.
(3) 12 A. C. 41.
(4) 1 A. C. 754.

Beven on Negligence is by far the most elaborate English work on the subject. After a minute review of the cases on contributory negligence, he says, vol. i, 2nd ed., p. 156: "There must first be evidence of negligence on the part of the defendant; then the defendant may show, either by calling witnesses or out of the plaintiff's own case—not that the plaintiff has been guilty of negligence, for the plaintiff is entitled to say, I may be just as negligent as I please, that does not excuse your injuring me; you—the defendant—must show that you were ordinarily prudent and careful in what you did, and that with ordinary care and diligence you could not avoid injuring me; that the negligence of the plaintiff was such as produced the accident, despite the exercise of ordinary care and diligence on the part of the defendant. A negligent plaintiff is not, because he is negligent, to be made the victim of a recklessly negligent act" (3).

The cases of negligence are of three classes—1. Where the defendant is taking an active part in the occurrence, and after the risk to the plaintiff has accrued, and is or ought to be apparent, may or may not be capable of taking steps to avoid the accident; street accident cases like the present are of this class. 2. Where the defendant is absent from the occurrence, e.g., where he has left an obstruction on the road the day before. 3. An intermediate class, where the defendant is present, but has no power by any act of his to avoid the accident after the risk to the plaintiff has

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(1) [1916] 2 I. R. 472.

(2) 12 A. C. 41.

(3) See per Atkin L.J. [1919] 1 K. B., at p. 537.

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accrued, and is or ought to be apparent, although in some cases he may have an opportunity of trying to induce the plaintiff to avoid the accident by whistling or other warning. The ordinary level crossing cases, where it is impossible to stop the train when the driver could first have seen the plaintiff, are within this class. I have dealt with classes 2 and 3, at pp. 511, 512 of *Gaffney's Case* (1). They depend on different considerations from class 1, with which we are concerned here.

The common law approaches the subject from the point of view of the injured person. Without entering on the subject of involuntary trespass (which is fully discussed in Pollock on Torts, Beven on Negligence, Holmes on the Common Law, &c.), I think I am safe in laying down the following propositions:—1. A is not justified in inflicting direct personal injury on B without lawful excuse. 2. Driving a car in an important street in a town, though a lawful act, is one which may do serious injury to others. 3. A, driving a car, is bound to take reasonable care to prevent any such injury. 4. A knocks down and kills B. He could have avoided doing so by the exercise of reasonable care—(*a*) because he saw B when he could have avoided her by ordinary care, by stopping or altering his course, but did not do so; (*b*) because through want of ordinary care he did not see her in time to avoid her. Is (*a*) a lawful excuse? Is (*b*) a lawful excuse? What is the difference between the two? 5. B is negligent. (*c*) Her negligence made it impossible for A by reasonable care to avoid striking her. (*d*) Her negligence did not do so, and he still could, by reasonable care, have avoided striking her.

It would appear to me on principle that it follows from the propositions 1, 2, and 3 that A would now have no lawful excuse except in 5 (*c*), either in a civil or a criminal Court, although at one time in case 5 (*d*), if Lord Campbell's Act had been in force, he would not have been liable in a civil Court, although he would have been in a criminal Court. I allude to the time when in a civil Court it was necessary to prove that the defendant's negligence was the sole cause.

In *Gaffney's Case* (1) I did not refer to the criminal law. As it seems to me that it throws great light on the distinction between

(1) [1916] 2 I. R. 472.

cases where the defendant actually sees the plaintiff's danger and those in which he fails to see it by his own negligence, I shall shortly refer to three authorities. In applying them to civil cases it must always be remembered that "a higher degree of negligence is required to convict a person of manslaughter than to establish civil liability": 9 Halsbury, pp. 585 and 586, Cases in Notes. In Foster's discourse on homicide, 3rd ed., at p. 263, he says: "A person driving a cart or other carriage happeneth to kill. If he saw or had timely notice of the mischief likely to ensue and yet drove on, it will be murder, for it was wilfully and deliberately done . . . If he might have seen the danger, but did not look before him, it will be manslaughter for want of due circumspection. But if the accident happened in such a manner that no want of due care could be imputed to the driver, it will be accidental death, and he will be excused." The first edition of Foster was published in February, 1762, by himself. There is the third edition. In the margin is cited 1 Hale, 476. Hale's statement is as follows:—"A drives his cart carelessly, and it runs over a child in the street; if A had seen the child and yet drives on upon him, it is murder, but if he saw not the child yet it is manslaughter; but if the child had run cross the way and the cart run over the child before it was possible for the carter to make a stop, it is per infortunium; and accordingly this direction was given by us at Newgate Sessions in 1762, and the carter convict of manslaughter." Hale was then Lord Chief Justice of the King's Bench. It is plain that the conviction was for carelessness in not seeing the child in time to avoid the accident. It is plain, also, that the case of the child running across is simply an instance of Foster's principle where "no want of due care could be imputed to the driver." It had precisely the same effect as the contributory negligence of an adult which made it impossible for defendant to avoid the collision, and therefore it disproved the allegation that the carter's negligence was the cause of the collision. These passages from Hale and Foster have been constantly referred to, and never questioned as far as I know.

In the year 1873, in the case of *R.* v. *Cavendish* (1), the question came before the Irish Court for Crown Cases Reserved whether the direction of FitzGerald B. to the jury was correct.

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(1) I. R. 8 C. L. 178.

It was held correct. The passage I have read from Foster was quoted (p. 181) and adopted by the Court, FitzGerald B. stating at p. 184: "Such appears to me to be the law as laid down by Sir M. Foster, than whom I desire no higher authority in common law." I would call particular attention to the part on p. 179, "that the act of driving a cab in the street was a lawful one, and that he would be excused if that act was done with due care and caution on his part: that they need not trouble themselves with any particular consideration of the party on whom the burden of proof lay; that the real question was whether on all the facts due and proper caution was exercised by the defendant or not," and if they were satisfied of this they ought to acquit him.

As to 5 (*b*), in the last edition of Archibald, at p. 855, and in 9 Halsbury, p. 586 (par. 1183), there are statements as to the effect of contributory negligence in manslaughter. On examination they will be found to come to no more than this, that the fact that the deceased partly caused the accident by his own negligence is no defence, although at one time it would have been a defence in a civil action. The statements are plainly not intended to apply to contributory negligence by the deceased in the sense in which, at all events since *Tuff* v. *Warman* (1), it is a defence to a civil action, i.e., that it made it impossible for defendant to avoid the collision by ordinary care. Hale is clear as to this. I think the words "proximate and efficient cause" in par. 1183 in Halsbury are intended to show this. As to the dictum of Willes J. in *R.* v. *Birchall* (2), "that a man was not criminally responsible for negligence for which he would not be responsible in an action," and the criticisms on it referred to, we must remember that at that time the plaintiff's negligence was no longer a defence if the defendant could, by reasonable care, have avoided the collision; but if he could so have avoided it, he would be guilty of manslaughter.

Professor Dicey has said of Willes J.: "A critic were rash who questioned the suggestion of a jurist whose dicta are more weighty than most considered judgments" (Law of Constitution, 7th ed., p. 506). Willes J. tried the case of *Tuff* v. *Warman* (1), and was in the Common Pleas at the new trial motion. The judgment

(1) 2 C. B. N. S. 740; 5 C. B. N. S. 573. (2) 4 F. & F. 1087.

of the Exchequer Chamber was about 1864. When he made the statement in *R.* v. *Birchall* (1) in 1856 he knew the law as then laid down. His proposition appears to me to be absolutely correct as applied to the law at the time he made it, when it was no longer necessary to prove that the defendant's negligence was the sole cause, and when the defendant had to prove contributory negligence in its present meaning, i.e., that he could not have avoided the collision by reasonable care. If I am right in this, at the present day the law of negligence as laid down by Hale and Foster applies a fortiori to civil cases.

I shall now refer to a few authorities as to when the duty to act arises, and particularly as to the supposed distinction between "when defendant saw or knew the plaintiff's danger," and cases where "he ought to have known it if he had taken reasonable care"; but I just wish to say that I fail to see what bearing *Cotton* v. *Wood* (2) has on a case where the defendant's negligence is found by the jury, and the finding is not challenged, but expressly admitted. Lord Justice FitzGibbon in *Devlin's Case* (3) thus describes the duty of a driver approaching a cross-road: "Each" (driver) "was bound to drive at a reasonable speed, and, as he approached the cross-streets, to see that no person or vehicle was coming dangerously near from the other direction. Each driver was also bound to have his vehicle under such control as would enable him to pull up in time to avoid a collision with any person, vehicle, or thing which he might reasonably expect to see as the other street opened to his view. A runaway horse, a straying child, or a drunken man was as much to be avoided, if reasonably possible, as any other object, including a reckless driver." This applies where the driver was going straight on. Surely it applies with equal force when he turns the corner on his left in order to proceed down the crossing street on the left.

This was the duty of the driver to the public. It was what Anglin J., in the judgment adopted by the Privy Council in *Loach's Case* (4), calls "an abstract obligation incumbent on him." But he says "the duty of the defendants to the plaintiff, breach of which would constitute 'ultimate' negligence,

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(1) 4 F. & F. 1087.
(2) 8 C. B. N. S. 568.
(3) [1907] 2 I. R. 437, at p. 453.
(4) [1916] 1 A. C., at p. 726.

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only arose when her danger was, or should have been, apparent." "Upon the emergency arising, that abstract obligation became a concrete duty owing to the plaintiff to avoid the consequences of her negligence by the exercise of ordinary care. Up to that moment there was no such breach of duty to the plaintiff." . . . "But there is a class of cases where a situation of imminent peril has been created, either by the joint negligence of both plaintiff and defendant, or, it may be, by that of the plaintiff alone, in which, after the danger is or should be apparent, there is a period of time of some perceptible duration of time during which both or either may endeavour to avert the impending catastrophe . . . If, notwithstanding the difficulties of the situation, efforts to avoid injury" ["if"] "duly made would have been successful [but for some self-created incapacity which rendered such efforts inefficacious the negligence that produced such a state of disability] is not merely part of the inducing causes, a remote cause, or a cause merely sine qua non, but it is in very truth the efficient, the proximate, the decisive cause of the incapacity, and therefore of the mischief." . . . "Negligence of a defendant incapacitating him from taking due care to avoid the consequences of the plaintiff's negligence may in some cases, though anterior in point of time to the plaintiff's negligence, constitute 'ultimate' negligence, rendering the defendant liable, notwithstanding a finding of contributory negligence of the plaintiff." The Judge by this plainly means a finding that the plaintiff's negligence contributed to the collision in fact, not the complete finding of contributory negligence that the defendant could not by ordinary care have avoided the accident.

It seems to me that this case can be adapted to the present case by inserting "if" as I have done, and substituting for the words in brackets the words "the neglect to make such efforts." The importance of the judgment in the present case is the statement of the time when the special concrete duty to the negligent plaintiff arose "when her danger was or should have been apparent," and the description of the "perceptible period of time" after the danger is or "should be apparent," during which efforts may be made to avoid the collision; that is, until it becomes inevitable. This period I shall call the crisis. Is the judgment correct, or should the words "or should have been apparent" have been omitted? If not, the misdirection which lies at the root of the present case is established, and the only distinction between *Gaffney's Case* (1) and the present case becomes immaterial. In that case the driver failed to pull up when the plaintiff's "danger was apparent." Here he failed to pull up after "it should have been apparent."

The judgment is clear that failure to act during the crisis and to avoid collision, if reasonably possible, is conclusive against the defendant. The series of emphatic adjectives used by Anglin J. really amount to no more than the statement in the House of Lords in *Radley's Case* (2), "yet if the defendant could in the result by the exercise of ordinary care and diligence have avoided the mischief which happened, the plaintiff's negligence will not excuse him." I will add here that Lord Justice Holmes's statement in *Smith* v. *Browne* (3), "the negligence of a foot passenger, however great it may be, does not excuse the owner of a vehicle from exercising a reasonable amount of care and skill to avoid its consequences," is in substance simply the rule in *Radley's Case* (2), substituting "foot passenger" for "plaintiff," and "owner of vehicle" for "defendant." The peculiarity of *Loach's Case* (4) was this: the driver was guilty of no negligence after the crisis arose. It was then impossible for him to pull up and avoid the accident. So far it was like the level-crossing cases, where it is impossible to stop the train. But the antecedent "general duty," the "abstract obligation," had been violated in two particulars, when "the concrete duty to the plaintiff arose" in the crisis—(*a*) the car had not an efficient brake; and (*b*) he was going at an excessive speed. The effect of this antecedent negligence was that, though when the crisis arose he made every effort to avoid the accident, he was unable to stop the car in time. It is to this state of things that the judgment of Anglin J. as it stands (not as adapted by me) was held by the Privy Council to rule *Loach's Case* (4), and accordingly they held that as the incapacity to avoid the collision was the result of the antecedent negligence of the employer

(1) [1916] 2 I. R. 472.
(2) 1 A. C. 754.
(3) 28 L. R. Ir. 1.
(4) [1916] 1 A. C. 719.

and the driver, and though this was before the crisis arose, the subsequent negligence of the plaintiff did not afford any defence.

In the King's Bench Division Gibson J. seems to have treated the absence of look-out as a similar incapacity; this would be treating the crisis as only arising when the driver saw the plaintiff. I prefer to rest the case on the broader ground that the concrete duty to avoid the plaintiff arose when "the danger should have been apparent," that there was then no incapacity whatever, but simply failure to keep a proper look-out and avoid the accident.

I shall now state the main facts in *Loach's Case* (1) from the judgment of Lord Sumner: "It [the electric car] approached the crossing at from thirty-five to forty-five miles an hour. The driver saw the horses as they came into view from behind a shed at the crossing of the road and the railway, when they would be ten or twelve feet from the nearest rail, and he at once applied his brake. He was then four hundred feet from the crossing. If the brake had been in good order, it should have stopped the car in three hundred feet." He could do no more. There was no suggestion of any subsequent negligence by him. On the other hand, the companion of the deceased said that they were right on the track when he heard Sands (deceased) say, "Oh," and, looking up, he saw the car about fifty yards (one hundred and fifty feet) off. He says "he could then do nothing," and with the loaded waggon and horses going two or three miles an hour he probably could not. Now, there was nothing to prevent deceased and his companion seeing the electric car when it was four hundred feet off; but they did not see it until it was only one hundred and fifty feet off, and in the meantime they had passed on to the track. That was the plaintiff's negligence. It was plainly subsequent to the defendant's. Accordingly, Lord Sumner says, at p. 722: "Clearly if the deceased had not got on to the line he would have suffered no harm in spite of the excessive speed and the defective brake, and if he had kept his eyes about him he would have perceived the approach of the car, and would have kept out of mischief."

So far the case would be identical with the present if the motor-driver had not seen the deceased until he was within fifty yards when deceased saw him—a very serious difference. The motor-driver was guilty of no negligence in not seeing the deceased as soon as he could or in not taking all possible steps to avoid the collision at the earliest moment he could have seen the deceased; and the negligent act of the deceased in going on to the line was plainly subsequent to the motorman's negligence. Here the negligence of both continued up to the moment of the collision. The case on all these points is infinitely stronger for the defence than the present. Lord Sumner proceeds: "If the matter stopped there, his administrator's action must have failed, for he would certainly have been guilty of contributory negligence." This is very important. The deceased had the last opportunity of avoiding the accident, and by his negligence failed to use it. There certainly was no subsequent negligence of defendant.

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(1) [1916] 1 A. C. 719.

Why did not the matter stop there? What further question was there that could make the defendants liable? The accident was inevitable when Sands saw the motor-car fifty yards off, just as it was inevitable here when the driver saw the plaintiff and plaintiff saw the driver. The judgment proceeds: "It was the motorman's duty, on seeing the peril of Sands, to make a reasonable use of his brakes in order to avoid injuring him, although it was by his own negligence that Sands was in danger. Apparently he did his best as things then were," p. 723. I stop here for the present. Lord Sumner plainly accepts the statement of the dissentient Judge M'Phillips on p. 724, viz.: "The motorman after he saw the vehicle could not have stopped the car." Therefore, there was no evidence of negligence after the driver saw deceased. This is again identical with the present case, except in the vital particular that there the motorman saw deceased at the earliest possible moment. The driver could here have done nothing after he saw plaintiff. Judge M'Phillips continues: "Therefore, as nothing could be then done by the motorman to remedy the ineffective brake, the want of care of the deceased was the direct and effective contributory cause of the accident resulting in his death." That, in his opinion, closed the case, and there was no necessity for any further inquiry or question. Was he right in this? The Privy Council decided that he was wrong. I take up the quotation from Lord Sumner where I left off: "But partly the bad brake and partly the excessive speed, for both of which the appellants were responsible, prevented him from stopping, as he could have otherwise done. On these facts, which the jury were entitled to accept, and appear to have accepted, only one conclusion is possible. What actually killed Sands was the negligence of the railway company and not his own, though it was a close thing." The meaning of this is clear. The matters stated by Judge M'Phillips do not dispose of the case; a further inquiry is necessary. Why was the driver unable to avoid the deceased when he saw him? Because it was too late. Why was it then too late? Was the incapacity then to avoid the collision the result of negligence for which the defendants were responsible? This negligence, as it caused the incapacity to avoid the deceased when he saw him, must have been antecedent to that time, though its effect must have continued up to then. Why was the driver here unable to stop the car when he saw plaintiff? Because it was too late. Why was it too late? Because he could and ought to have seen her, when he could have stopped the car in time.

The judgments in *Gaffney's Case* (1) were in February, 1916; the judgment in *Loach's Case* (2) in the following July. In the latter case, if the brake had been in order, and the car going at a reasonable speed, but the motorman negligently failed to put on the brake when he saw the deceased going on to the track, can there be any doubt as to what the decision would have been? (See the judgments, p. 727, as to this.) These were the facts in *Gaffney's Case* (1). It is an authority binding on this Court, and I regard *Loach's Case* (2) as a complete confirmation of the decision; but it goes much farther. The order of events there was as follows:—1. In the morning the company send out the car with the bad brake. Their negligence is then complete. 2. The motorman is going at an excessive speed, but the moment he sees the car he puts on the brake. His negligence is then complete: four hundred feet from the crossing. 3. The negligence of deceased only began then, viz., not seeing the motor when the motorman saw him, and going on, and thereby in fact causing the accident. It would not have happened otherwise. This negligence continued until the collision became inevitable. 4. The defendants were absolutely guilty of no negligence after the deceased's negligence began. 5. The motorman could not have avoided the accident after the negligence of deceased began. 6. The deceased could have avoided the accident after the defendants' negligence had finished. On these facts the defendants were held liable. Why? Because in the result they could "by ordinary care have avoided the mischief": *Radley's Case* (1). See the two last paragraphs of Lord Sumner's judgment.

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(1) [1916] 2 I. R. 472.

(2) [1916] 1 A. C. 719.

It seems to me that *Loach's Case* (2) decides that the plaintiff's negligence is immaterial—1. When after the danger was apparent the defendant could by ordinary care have avoided the accident. 2. When he could have done so but for his own antecedent negligence. 3. That the judgment of Anglin J. justifies the addition of the words "or should have been apparent" after apparent. *Gaffney's Case* (3) decided the general principles—1. That it is no defence to prove that the accident was the result of negligence of both plaintiff and defendant; or, 2, that the plaintiff's negligence and defendant's were concurrent, and the plaintiff's lasted up to the instant of the collision; or, 3, that defendant's negligence in not stopping occurred at a period prior to collision, while plaintiff was actually moving towards car when struck, and his negligence continued until the collision. The plaintiff could have avoided the accident if he had stopped the instant before the collision. This was no defence, and the proper question was: Could the defendant by ordinary care have avoided the collision? The Court adopted and acted on the principle stated by Holmes L.J. in *Smith* v. *Browne* (4). (See judgment of the Lord Chancellor, pp. 485-6; and my judgment, pp. 527 to 530.) The decision, in fact, and my judgment in particular, were specially based on the fact that the driver actually saw the plaintiff's danger and failed to stop. If there is any difference in principle between this and negligence in failing to see her in time to avoid her, it does not cover the present case. With this

(1) 1 A. C. 754.
(2) [1916] 1 A. C. 719.
(3) [1916] 2 I. R. 472.
(4) 28 L. R. Ir. 1.

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exception, it rules the present case in my opinion. It disposes of all questions as to priority of time in plaintiff's negligence and defendant's, and of the fact that plaintiff could have avoided the accident by reasonable care.

The only criticism I have heard on *Gaffney's Case* (1) is that sufficient attention was not paid to the negligence of the plaintiff. I need only refer to my own judgment at pp. 492, 493. The plaintiff's negligence was practically the same in *Loach's Case* (2), *Gaffney's Case* (1), and the present case. The only material difference between *Gaffney's Case* (1) and the present is that there the driver saw the plaintiff in time to avoid the collision; his negligence was in not acting then. Here the negligence was in not keeping a reasonable look-out, whereby he failed to see the plaintiff in time to avoid the accident. The necessity for a careful and continuous look-out is, if possible, even greater in street traffic than at sea. Has it ever been suggested that negligence in this is not negligence of the gravest character? Is the rule in *Radley's Case* (3), "yet, if the defendant could, in the result, by the exercise of ordinary care have avoided the mischief, the plaintiff's negligence will not excuse him," henceforth to be read with the proviso: "Negligence of the defendant in not keeping a look-out shall not be deemed a want of ordinary care on his part"? No authority was cited in favour of such a view. There are some remarks in my judgment in *Gaffney's Case* (1) to the effect that the negligence of a person who drives on, seeing the danger, is worse than that of a person who negligently fails to see it. I think the distinction between murder and manslaughter taken by Foster and Hale justifies these remarks.

It is difficult to find authority for an obvious proposition, but I will refer to a few—1. The judgment of Anglin J.: "When the danger was or should have been apparent." 2. Lord Sumner's statement at p. 722 of *Loach's Case* (2), as to the negligence of the deceased, already quoted. 3. The statements of the law by the Lord Chief Baron in *Coyle* v. *Great Northern Railway Co.* (4). At p. 416, of *Coyle's Case* (4), the Chief Baron says of a person who does not look when it is his duty: "His legal position does not appear to me to differ from that which it would have been if he had actually known what, by using due care, he would have known. To hold otherwise would be to enable a person to take advantage of his own wrong." It would have been negligence for him to cross the line if he had looked and seen the approaching train, and, although he may not have seen it, he was in the same position as if he had seen it, because it was his duty to have looked and seen whether the train was approaching or not. Here if the driver had looked before him, as it was his duty to do, he would have seen the plaintiff in time to avoid the accident. Is he not in the same position, so far as negligence is concerned, as if he had seen her in time? In *Morrison* v. *General Steam Navigation Co.* (1) the plaintiffs' ship was bound to exhibit a light, and failed to do so. At p. 738, Pollock C.B., in delivering judgment, said: "The point I left to the jury involved the question whether the plaintiff himself did not contribute to the accident by his own carelessness . . . We are clearly of opinion that no change in the law has been effected by this regulation of the Admiralty; but that persons in navigating their vessels are still bound to keep a look-out, just as they were before these regulations were made; and if it could be clearly made out that a vessel having no light had run down another, from sheer carelessness and negligence in not keeping a good look-out, we agree with Mr. Watson in thinking that in such a case the plaintiff would have had a right to compensation from the defendants." It will be noted that this case was decided on the Common Law. In the Admiralty Court there is no greater negligence than absence of proper look-out.

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(1) [1916] 2 I. R. 472.

(2) [1916] 1 A. C. 719.

(3) 1 A. C. 754.

(4) 20 L. R. Ir. 409, at pp. 418, 419.

4. Finally, there is the specific decision in the next case. The case of *Toronto Railway* v. *King* (2) seems to me in principle to decide the point involved not covered by *Gaffney's Case* (3). It was a collision between a van (plaintiff) and tramcar (defendant). I refer to the judgment of the Privy Council (Lords Loreburn, M'Naughton, Atkinson, Collins, and Sir A. Wilson), a very strong Court, delivered by Lord Atkinson. It is obvious that the case turned on questions 4, 5, and 6. They are in substance—4. Could defendant have

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(1) 8 Ex. 733.

(2) [1907] 13 Ont. L. R. 423.

(3) [1916] 2 I. R. 472.

avoided the accident when he saw plaintiff and accident imminent? 5. Ought he to have seen him sooner than he did and that accident was imminent? 6. Could he have avoided the accident if he had seen plaintiff when, in your opinion, he ought to have seen him? In the Court below the majority held—(*a*) There was evidence of negligence of defendant in not seeing plaintiff. (*b*) There being evidence of negligence on both sides, the plaintiff's action fails unless the defendant became aware of the man's danger, and notwithstanding the latter's negligence might, by ordinary care, have avoided the accident. That is, they treat No. 4 as the decisive question, and Nos. 5 and 6 as immaterial. How does the Privy Council deal with this? In the paragraph, p. 269, "It may well be." This plainly means, assuming that the answer to 4 should have been "No," that it was then too late. What evidence of negligence remains if 4 is negatived? Plainly 5 and 6, and it is on the answers to these that the case rests.

The respondents only ask for a new trial. I find great difficulty in seeing why the answer of the jury to the first question should not be applied to the third if put without the misdirection. However, the question was not argued. On the whole case I am of opinion that the plaintiff is entitled to a new trial: 1, On the ground of misdirection; 2, on the grounds stated by the Court below; 3, on the ground that having regard to the first finding of the jury the answer to the third question was against the weight of evidence.

It seems hard on a defendant that a plaintiff who has been guilty of grave negligence should be placed in the same position as a plaintiff who has been guilty of none, if the defendant could have avoided the injury. In Canada they have met this by a statute enabling the jury to make a deduction from the damages on account of the plaintiff's negligence. It is very difficult to get juries to understand that the question is not which party is more to blame. Our law never permitted a comparison of degrees of negligence either at Common Law or in Admiralty: see per Lord Blackburn in *Cayzer* v. *Carron Co.* (1). It was first introduced into English law by the Maritime Convention Act of 1911.

My colleagues think the law is unsettled. I think it is settled for this Court by *Radley's Case* (2), *Gaffney's Case* (3), *The Toronto*

(1) 9 A. C. 873, at p. 881. (2) 1 A. C. 754. (3) [1916] 2 I. R. 472.

Case (1), and, above all, by *Loach's Case* (2). Lord Justice O'Connor feels great difficulty as to what is to happen in a collision between two motor-cars, where there is negligence on both sides, and one car is damaged to the extent of £500 and the other to the extent of £100. If they were ships, the loss would be divided according to the old Admiralty rule, extended to all Courts by the Judicature Acts, as now modified by the Act of 1911. However, taking Lord Lindley's rules in *The Bernina* (3), viz., A is injured by B by the fault of both combined, the following rules apply: A can sue B, etc. If in the same transaction B is injured by A, I confess I find great difficulty in seeing why B should not have the benefit of the same rules for his damage. Of course, no such question could have arisen when the rule of the defendant's sole negligence existed. However, in the present case no such question arises. It must be settled in some other case.

If the view of the law I have taken is correct, it seems to me that an ordinary running-down case could be tried by one question, viz., "Could defendant, notwithstanding plaintiff's negligence, if any, by reasonable care have avoided the injury?" At the same time, I think such a form of questions as Nos. 1, 2, and 3, put by Kenny J. to the jury in *Gaffney's Case* (4), makes them really consider what the negligence, in fact, was. In 3 I should substitute for "consequences of plaintiff's negligence" "the accident" or "the injury." Lord Sumner deprecates the use of adjectives with the word "cause." I should prefer omitting that word itself for the reasons stated in *Gaffney's Case* (4). Sir William Erle's direction in *Dowell* v. *The General Steam Navigation Co.* (5), quoted by me in *Gaffney's Case* (4) at p. 497, seems to me the best. The difficulty arose—1, from the answer to the second question; and 2, from the third question, which, I think, should not have been put. It is not involved in the direction.

Finally, I wish to make a correction as to the passage quoted in *Gaffney's Case* (4), p. 525, from the judgment of FitzGibbon L.J. at pp. 452–493 in *Devlin's Case* (6). I find I was in error in

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(1) [1907] 13 Ont. L. R. 423.
(2) [1916] A. C. 719.
(3) 12 P. D. 89.
(4) [1916] 2 I. R. 472.
(5) 5 E. & B. 195.
(6) [1907] 2 I. R. 437.

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accepting his statement that it was the language of Sir F. Pollock. The portion now relied on—that on p. 452—is not his language. At p. 488 of the 10th ed. of Pollock on Torts he says: "A learned writer . . . has suggested that 'hardly sufficient attention has been paid herein to the distinction between cases where the negligent acts are simultaneous and those where they are successive. . . .'" Sir F. Pollock does not express any approval of the suggestion. It appears from note (*h*), p. 489, that it was contained in a review of Shearman and Redfield on Negligence, which appeared in the Law Quarterly Review in 1889—thirty years ago. No case is referred to in which this rule was applied. The only case referred to in relation to the distinction is an American case of *Murphy* v. *Deane* (1) in 1869—fifty years ago, twenty years before the suggestion—and even in that case it does not seem to have had any application. Having quoted the "suggestion," Sir F. Pollock makes no comment on it, but passes on to another subject. I do not think I was justified in *Gaffney's Case* (2) in stating that FitzGibbon L.J. approved of the passage. It had nothing to say to *Devlin's Case* (3), which was that of a man guilty of no negligence.

O'CONNOR L.J.:—

A woman who is crossing a street without keeping a proper look-out does not see an approaching van; the vanman, who is driving along the street without keeping a proper look-out, does not see the woman. There is a collision, in which, as one might expect, the van injures the woman; the woman does not injure the van. Such, in essentials, are the facts of this case: for I regard as immaterial the circumstance that the vandriver, when he turned round to see where he was going, did see the woman, for he was then too late to save her. The jury found both parties guilty of negligence.

As I understand the law in cases of this kind, it is this: Where there is negligence on both sides a further question arises: what was the ultimate negligence which caused the accident? If such ultimate negligence is that of the plaintiff, the plaintiff fails; if it is that of the defendant, the defendant is responsible; if it is the combined negligence of plaintiff and defendant, the plaintiff also fails, even though the preponderance of blame lies on the defendant: *Dowell* v. *General Steam Navigation Company* (1). If I am right in my conception of the legal principle, then it follows upon the facts and findings in this case that the ultimate negligence was that of both parties. It is no more possible to say that the defendant could by the exercise of ordinary care have avoided the accident than that the plaintiff could by the exercise of ordinary care have avoided the accident. If the vanman had been keeping a proper look-out, he would not have collided with the woman; if the woman had been keeping a proper look-out, she would not have collided with the van. The case is, in my opinion, quite different from *British Columbia Electric Railway Company, Ltd.*, v. *Loach* (2). In that case when the motorman saw the danger he was guilty of a breach of duty in not stopping: and it was held that the circumstance that, by reason of his negligence in driving with an ineffective brake he could not stop, made no difference, and that his breach of the duty to stop was the ultimate cause of the accident. For these reasons, I agree with the Lord Chancellor that the appeal should be allowed.

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(1) 101 Mass. 455. (2) [1916] 2 I. R. 472. (3) [1907] 2 I. R. 437.

The present simple case has given rise to a considerable divergence of judicial opinion, and I own that I give my view with great diffidence. I join the Lord Chancellor in the hope that a new formula may be devised which will prevent any doubt or difficulty in similar cases, or, alternatively, that such an exposition may be given of the application of the well-worn formula as will deliver us from the perplexity in which we find ourselves when we attempt to apply it.

Solicitor for the plaintiff: *James M'Auliffe.*
Solicitor for the defendant: *Maurice Healy.*

R. ST. J. C.

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(1) 5 E & B. 195.

(2) [1916] A. C. 719.

K. B. Div.
(Revenue.)
1920.
Jan. 26.
——
Appeal.
April 27.

J. F. M'LAUGHLIN (SURVEYOR OF TAXES), APPELLANT; BAILEY, RESPONDENT (1).

Revenue—Income Tax—Stud farm—Stallion fees—Mode of assessment—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *sect.* 63, *Schedule B*; *sect.* 100, *Schedule D, First Case, Sixth Case—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *sect.* 2, *Schedules B and D.*

The owner and occupier of a farm used it principally for the breeding of racehorses and hunters for sale. She kept upon the lands a number of mares and two stallions. In addition to serving the farmer's own mares, one of the stallions was used for the service of mares belonging to other owners, which mares arrived at the farm about a month before foaling, and remained there for about three months. For the service of these mares fees were received by the owner of the stallion.

Held (affirming the King's Bench Division), that the stallion fees so received from outsiders were liable to assessment under Schedule D of the Income Tax Acts.

CASE STATED under the Taxes Management Act, 1880, sect. 59, by the Commissioners for the special purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice in Ireland.

The Commissioners set out the facts as follows:—

1. At a meeting of the Commissioners for the special purposes of the Income Tax Acts held on 12th October, 1917, for the purpose of hearing appeals, Mrs. Blanche Bailey, hereinafter called the respondent, appealed against an assessment to income tax in the sum of £605 for the year ending 5th April, 1918, made upon her under the provisions of the Income Tax Acts, in respect of profits from stallion fees.

2. The respondent is owner and occupier of a farm of 194 statute acres, of the annual value according to the Poor Law Valuation of £326 1*s*., at Rathbane, County Limerick, and she has been duly assessed to income tax under Schedule B in respect of the occupation of the land. Cattle are kept on the farm, but only to the extent necessary for keeping the ground in good condition, and the principal purpose for which the farm is used is the

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(1) Before MOLONY C.J., and GIBSON and SAMUELS JJ.; and in the Court of Appeal, before SIR JAMES CAMPBELL C., and RONAN and O'CONNOR L.JJ.

breeding of racehorses and hunters for sale. A varying number of mares are kept for this purpose (the highest number hitherto kept at any one time being forty), and two stallions.

3. One of the stallions, "Bachelor's Double," was formerly a successful racehorse. He was acquired in November, 1911, at the conclusion of his racing career, and he has obtained a high reputation as a sire. In addition to serving the respondent's own mares, "Bachelor's Double" is used for the service of mares belonging to other owners, which arrive at Rathbane about a month before foaling, and remain for about three months on the farm. "Bachelor's Double" never leaves the farm. For the service of these mares a fee is charged, usually amounting in the year 1917, to £49 per mare, the fee having been reduced in that year on account of the war. No information was available as to the relative extent to which the horse is used for serving the respondent's own mares and those of other owners respectively. The fees received for the service of visiting mares amounted to £755 in the fourteen months ending 31st December, 1912; £1,114 in the year 1913; £1,346 in 1914; £1,390 19*s.* in 1915; and £1,180 6*s.* 5*d.* in 1916.

4. A second stallion, "Rhosmarket," was purchased in February, 1912, and some small amounts were received in the years 1912, 1913, and 1914 for his service of mares belonging to persons other than the respondent; but these fees were less than the expenses incurred for his keep, &c. A half-bred stallion was substituted in 1915, which has been used solely for the service of the respondent's own mares.

5. For the year ending 31st December, 1916, accounts were furnished showing a loss on the farm of £2,292 after eliminating the profits arising from stallion fees. No accounts were available showing the general results of the farm for the years 1914 and 1915; but accounts were furnished from which it appeared that the profits made from the fees received for the service of mares belonging to persons other than the respondent, after allowance of the expenses incurred for the maintenance and management of the stallions, amounted to £730 in 1914; £652 in 1915; and £434 in 1916. The assessment of £605 under appeal was made under Schedule D of the Income Tax Acts upon the average

amount of these profits from stallion fees in the three years 1914, 1915, and 1916.

6. It was contended on behalf of the respondent that the profits from stallion fees were profits arising in respect of the occupation of the land, and were included in the assessment upon the respondent under Schedule B.

7. It was contended by the Surveyor of Taxes that the profits from stallion fees were not profits arising in respect of the occupation of land, but were profits of a trade or concern in the nature of trade, and were assessable under Schedule D.

8. We, the Commissioners who heard the appeal, were of opinion that the contentions of the Surveyor of Taxes were correct; but in deference to a previous decision of the County Court Judge, in a case which could not be distinguished, that such profits were included in the assessment under Schedule B, we discharged the assessment under Schedule D.

9. The Surveyor of Taxes, immediately upon the determination of the appeal, declared to us his dissatisfaction therewith as being erroneous in point of law, and in due course required us to state a case for the opinion of the High Court pursuant to the Taxes Management Act, 1880, sect. 59, which case we have stated, and do sign accordingly.

The Solicitor-General, Daniel Martin Wilson K.C. (with him *Wylie K.C.*, and *George Shannon*), for the appellants:—

Profits from stallion fees are not profits arising in respect of the occupation of land, but are profits of a trade or concern in the nature of trade. The Commissioners who heard the appeal were of this opinion, but in deference to a previous decision of the County Court Judge, in a case which could not be distinguished, that such profits were included in the assessment under Schedule B, they discharged the assessment under Schedule D. Fees for the hiring out of a stallion are for income tax purposes in the same category as payments received on hiring out a machine or other movable chattel. The profits have no necessary connexion with the occupation and working of the farm. The case is ruled, we submit, by the decision of the House of Lords in *Malcolm* v. *Lockhart* (1).

(1) 55 Sc. L. R. 98; [1919] A. C. 463.

S. L. Brown K.C. (with him *Fforde*), for the respondent:—*Malcolm* v. *Lockhart* (1) was decided on principles which do not apply to this case. In that case the farmer was an ordinary farmer, who worked an arable farm in the ordinary way. The keeping of a stallion was no part of the ordinary working of the farm. A stud farm is in a different position. The keeping of one or more stallions on the farm is essential to the mode of working the farm. That this distinction is a real one is obvious from the judgment of the Lord President of the Court of Session in *Malcolm* v. *Lockhart* (1), and from the speech of Lord Buckmaster in the House of Lords. In the Scotch case the entire horse was frequently brought away from the farm to serve mares outside. "Bachelor's Double" remained always on the farm.

Molony C.J. delivered the judgment of the Court:—

This is a case stated to determine the question whether profits made by the respondent by means of letting out the services of a stallion called "Bachelor's Double" were or were not profits, which were already included in an assessment under Schedule B, and consequently were incapable of separate assessment under Schedule D of the Income Tax Acts.

It appears that the respondent, Mrs. Blanche Bailey, is the owner of a farm of 194 acres at Rathbane, County Limerick, and that she uses that farm principally for the purpose of breeding racehorses and hunters. A varying number of mares are kept on the farm—the highest number which hitherto has been kept for this purpose being forty—and two stallions.

In addition to the mares which Mrs. Bailey owns, one of the stallions, "Bachelor's Double," is used for the service of mares belonging to other owners, and these mares arrive at the respondent's place at Rathbane about a month before foaling, and remain for about three months on the farm. The stallion "Bachelor's Double" never leaves the farm. Large sums were received from outside persons in respect of the services of this particular stallion, amounting in the year 1913 to £1,114; in the year 1914 to £1,346; in 1915 to £1,390 19*s.*; and in 1916 to £1,180 6*s.* 5*d.* After allowing for the expenses incurred in the management and maintenance of the stallion, it appeared to the Commissioners that the profits arising from the services of this particular horse amounted to £730 in 1914, £652 in 1915, and £434 in 1916, and calculating the assessment under Schedule D of the Income Tax Acts upon the average amount of the profits from stallion fees in the three previous years 1914, 1915, and 1916, the Commissioners assessed a sum of £605 for the year 1917. This is the assessment involved in this appeal.

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(1) 55 Sc. L. R. 98; [1919] A. C. 463.

In the assessment no sum is taken into account for the service of this lady's own mares, and the only question we have to determine is whether the profits arising from stallion fees are profits arising in respect of the occupation of land, or are profits of a trade or concern in the nature of trade, and assessable under Schedule D.

Schedule B is confined to profits made in respect of the occupation of land, and in that category are included all profits which ordinarily and naturally flow from the occupation of land.

Schedule D is confined to profits derived from a trade, manufacture, adventure, or concern in the nature of trade, and includes by reason of the sixth case any annual profits or gains not charged by virtue of any of the other schedules contained in the Act.

The Commissioners who heard the appeal were of opinion that the contentions of the Surveyor of Taxes were correct, and that the profits from stallion fees were not profits arising in respect of the occupation of land; but in deference to a previous decision of the County Court Judge in a case which could not be distinguished, they discharged the assessment on the ground that such profits were included in the assessment under Schedule B, and could not be brought within Schedule D.

There is no doubt on the authorities that while an assessment under Schedule B includes everything that naturally flows from the occupation of land, once you get a distinct entity outside the ordinary occupation of land which brings in an annual profit or gain, there is no reason why there should not be an assessment under Schedule D in respect of such profit or gain.

The case of *Carlisle & Silloth Golf Club* v. *Smith* (1) is an illustration of one mode of user of land which would support an assessment under Schedule D, but the case which has been properly relied upon as governing the present one is the Scotch case, *Lockhart* v. *Malcolm* (1). That case was sought to be distinguished from the present case by Mr. Brown on two grounds—1, that the farm in that case was an ordinary farm, and not a stud farm; and 2, that the stallion was sometimes brought away from the farm for the purpose of serving mares, whilst here "Bachelor's Double" remained always on the farm. We do not think that either of these distinctions affects the principle of the case, which may be said to be that where a user is made of anything not directly connected with the user of the farm, even though usefully worked in connexion with it, and the profit made thereby is capable of being separately ascertained, there is no reason why there should not be an assessment under Schedule D.

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(1) [1913] 3 K. B. D. 75.

In this case the ordinary user is that of a stud farm, but entirely apart from that there is the extra and additional profit, consisting of the letting out of the services of this animal, and in respect of this an assessment under Schedule D can be made.

I do not think it necessary to go through the judgments of the four learned Judges in the Court of Session, the net result of which is contained, I think, in the judgment of Lord Buckmaster in the House of Lords. He said (page 466):—"It is quite possible that an entire horse may be used by a farmer in connexion with his farm in such a manner that its use outside will, in relation to its use for his own purposes, be so trivial and unimportant that there would be no tax exigible in respect of profits received for its services; or, on the other hand, it may be that the real use and purpose of the animal and its real advantage to its possessor lie in the moneys which can be obtained by the use of its services outside. My Lords, this question is essentially a question of fact; the Commissioners in this case have decided that the use by the appellant of this stallion is a use that provides a profit which does not arise in respect of the occupation of his lands." The Commissioners in the present case have on sufficient evidence arrived at the same conclusion.

(1) 55 Sc. L. R. 98; [1919] A.C. 463.

The value of a stallion may consist of two items: first, the value to the owner in respect of the owner's own mares when the farm is mainly used as a stud farm: in respect of such user no assessment is here sought to be made; and, secondly, where apart from the owner's own mares a profit is made by reason of letting out the services of the stallion to other mares, whether or not the mares come to the farm for a short or long period; that is a user which is capable of being reached under Schedule D.

We therefore hold that the opinion of the Commissioners in this case is right, but that their decision was wrong, and we accordingly reverse their decision, and direct the assessment to be restored.

H. J. M'C.

The respondent appealed to the Court of Appeal (1).

S. Brown K.C., *H. Wilson K.C.* (with them *C. Fforde K.C.*, and *Phelps*), for the appellant:—

The assessable subject-matter under Schedule B is profit arising in respect of the occupation of land. If all the mares served by these stallions were the appellant's own property, she would be assessable only under Schedule B. Taking in visiting mares for the service of which a fee is charged is nothing more than using the lands to the best advantage. These 194 acres are absolutely essential for the purpose of carrying on a stud farm.

Profits arising from lands occupied as nurseries or gardens for the sale of produce are by rule 8 of Schedule B estimated according to the provisions and rules applicable to Schedule D. Case III, rule 4, of Schedule D provides that if the lands occupied by dealers in cattle and vendors of milk are insufficient for the keep of the cattle brought on them, a statement of profits may be required under Schedule D. To make profits of the foregoing description assessable under Schedule D special legislation was passed. If the Legislature had not specifically brought these profits within Schedule D, they would still be liable to taxation under Schedule B only.

(1) In the Court of Appeal, before SIR JAMES CAMPBELL C., and RONAN and O'CONNOR L.JJ.

The King's Bench Division decided this case entirely on the authority of *Malcolm* v. *Lockhart* (1); but there the assessment under Schedule D was in respect of fees earned by a stallion which served the mares of other owners at their own farms. This conclusion is supported by the following passage in Lord Buckmaster's judgment: "It may be that the real use and purpose of the animal, and its real advantage to its possessor, lie in the moneys which can be obtained by the use of its services outside." In Dowell's Income Tax Laws, 8th edition, the note on the case is headed "Stallion fees—Earned outside farm."

The Solicitor-General (*D. M. Wilson K.C.*), *Wylie K.C.*, *G. Shannon*, and *H. Kennedy*, for the respondents, were not called upon.

Sir James Campbell C.:—

We do not think it necessary to hear the respondents. This is an appeal from an assessment under Schedule D of the Income Tax Acts made upon the appellant, Mrs. Blanche Bailey, in respect of certain profits stated to have been acquired by her in the following circumstances:—She is the owner and occupier of a farm of 194 statute acres, of the annual value of £326, and she has been duly assessed to income tax under Schedule B in respect of the occupation of the land. Cattle are kept on the farm, but only to the extent necessary for keeping the ground in good condition, and the principal purpose for which the farm is used is the breeding of racehorses and hunters for sale. A varying number of mares are kept for this purpose (the highest number hitherto kept at any one time being forty), and two stallions. One of the stallions, "Bachelor's Double," was formerly a successful racehorse. He was acquired in November, 1911, at the conclusion of his racing career, and he has obtained a high reputation as a sire. In addition to serving Mrs. Bailey's own mares, "Bachelor's Double" is used for the service of mares belonging to other owners, which arrive at the farm about a month before foaling, and remain for about three months on the farm. "Bachelor's Double" never leaves the farm. For the service of these mares a fee is

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(1) 55 Sc. L. R. 98; [1919] A. C. 463.

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charged, usually amounting, in the year 1917, to £49 per mare, the fee having been reduced in that year on account of the war. No information was available as to the relative extent to which the horse was used for serving Mrs. Bailey's own mares and those of the other owners respectively. The fees received for the service of visiting mares amounted to £755 in the fourteen months ending 31st December, 1912; £1,114 in the year 1913; £1,346 in 1914; £1,390 19*s.* in 1915; and £1,180 6*s.* 5*d.* in 1916. A second stallion, "Rhosmarket," was purchased in February, 1912, and some small amounts were received in the years 1912, 1913, and 1914 for his service of mares belonging to persons other than Mrs. Bailey, but these fees were less than the expenses incurred for his keep. It was admitted that an extra charge was made for the keep of mares of outsiders for the time they were on the farm.

In these circumstances it was contended on behalf of the owner of the farm that she is entitled to make the occupation of it as profitable to her as enterprise, capital, and ingenuity will enable it to be made, and that in so far as these profits are to be attributed to the occupation of the farm they are a matter of assessment under Schedule B, and that an assessment cannot be made in respect of them for a second time under Schedule D. We are of opinion that that proposition has no application in regard to the stallion fees received by this lady in respect of the mares brought in from outside and not belonging to the owner of the farm. It would, of course, theoretically and practically, be open to the owner of a stud-farm so to arrange his business that the entire proceeds might be and could be applied to mares of his own kept upon the farm for the purpose of breeding; but it is not necessary for the Court to say or conclusively to determine whether in every case of a transaction of that kind the profits could only be assessed under Schedule B. A case might be conceived in which, either from the magnitude of the transaction or otherwise, it might possibly be held that a business was being carried on over and above the ordinary natural use of the farm and lands for the purpose of cultivation; but that question does not arise for our decision, and I am pronouncing no opinion on it.

Our decision is solely conversant with the profits made in respect of the mares that did not belong to the owner of the farm, and as to these we are of opinion that the services of the stallion were sold by this lady to the owners of these mares, and that in respect of this portion of the transaction she was carrying on a business or industry, the profits of which are liable for assessment under Schedule D.

We are all also of opinion that it is practically impossible to distinguish the facts in this case in principle, in so far as they relate to this particular portion of the profits made from the services of these stallions, from the decision of the Scotch Court of Session, First Division, in *Malcolm* v. *Lockhart* (1). It is quite true that in that case it appeared that the stallion kept upon the farm when serving mares of people from outside did not serve them upon the farm, but was sent to the farms or stables of the owners of the mares, or some other place where service was effected; but each member of the Court went out of his way, if I may say so, to emphasize his opinion that the fact mentioned made no distinction in principle, and when the case came to the House of Lords (2) Lord Buckmaster said:—"It is quite possible that an entire horse may be used by a farmer in connexion with his farm in such a manner that its use outside will, in relation to its use for his own purposes, be so trivial and unimportant that there would be no tax exigible in respect of profits received for its services; or, on the other hand, it may be that the real use and purpose of the animal and its real advantage to its possessor lie in the moneys which can be obtained by the use of its services outside." It was at first suggested, though not very strenuously, that the passage I have read from the judgment of Lord Buckmaster made a cardinal distinction for the purpose of his decision between the case of a stallion which served the mares of other people upon the lands of its owner and a case such as that of *Malcolm* v. *Lockhart* (1), where the services took place outside. It is clear, however—and I think it was ultimately admitted by counsel for the appellant—that this is not the true ground of the decision of Lord Buckmaster, and that, in fact, he adopts the reasoning of the members of the First Division of the Court of Session in Scotland; that the cardinal and only distinction which he has taken is as between services by a stallion for the owner's

(1) 55 Sc. L. R. 98.

(2) [1919] A. C. 463, at p. 466.

Sir James
Campbell C.

own purposes, as distinguished from services by the same stallion for the benefit of persons from outside; and, accordingly, having regard to the unanimous view of the Scottish Court, and, I think, to the ratio decidendi of Lord Buckmaster's decision, I cannot agree with the suggestion contained in the last edition of Dowell's Income Tax Laws, that the decision turned upon where the services took place; the real distinction, as I have said, is that between services upon the farm for the benefit of the owner of the stallion and services which were for the benefit and at the request of persons from outside. Speaking for myself, I cannot distinguish this case in principle from other similar cases, not perhaps exactly identical, but certainly running on parallel lines. Take, for instance, a large farmer's holding of 200 acres with a mill upon it. He uses that mill for the purpose of grinding his own corn, but that does not exhaust the powers of the mill, and he invites farmers outside to send their corn to the mill to be ground for reward to him. It seems to me that in a case of that kind the profits in so far as they were acquired from outside, using the expression in the same sense as in Lord Buckmaster's judgment, would be liable to assessment under Schedule D.

My colleague, Lord Justice Ronan, has suggested another case, which is not only a possible but a probable one. A farmer invests in a large and expensive threshing machine. It can do more work than can be provided by his own farm; he does not want it to stand idle, and he invites neighbours to employ the machine at a certain fee to thresh their corn. He may do that upon his own land, or he may send the machine to the lands of those willing to hire it. It seems difficult to say that in such a case the owner would not be liable to assessment under Schedule D in respect of the profits made from this extra use of the threshing machine; but, be that as it may, we are all of opinion that we cannot in principle distinguish this case from the decision in *Malcolm* v. *Lockhart* (1); and, accordingly, we must affirm the decision of the King's Bench Division—that is to say, in so far, and in so far only, as it holds and decides that in respect of the profits earned by the hiring of this stallion to persons other than the owner of the farm the appellant was liable to be assessed under Schedule D.

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(1) 55 Sc. L. R. 98; [1919] A. C. 463.

Ronan L.J.:—

I am of the same opinion, and for substantially the same reasons. For practical purposes there is no difference between the case of a farmer who keeps a threshing engine for hire and that of a farmer who keeps a stallion which is used for the service of mares belonging to other persons, and for which services he receives fees. I think the observations of Lord Finlay in *Malcolm* v. *Lockhart* (1) are very important. He says: "My Lords, I am of the same opinion. Every case of this kind really depends upon questions of fact, and very largely, in most cases, it resolves itself into a question of degree. I see no reason whatever which would justify us in overruling the conclusion at which the Commissioners have arrived, and it seems to me that the appeal must be dismissed." I think every word of that judgment applies to this case; and I think also that the result of the finding by the special Commissioners is in substance that the letting out of the services of this stallion constituted a separate business.

There are two or three facts to which I should like to call attention. The Lord Chief Justice, in his judgment, says:—"The case which has been properly relied upon as governing the present case is the Scotch case, *Malcolm* v. *Lockhart* (1). That case was sought to be distinguished from the present case by Mr. Brown on two grounds—1, that the farm in that case was an ordinary farm and not a stud farm; 2, that the stallion was sometimes brought away from the farm for the purpose of serving mares, whilst here 'Bachelor's Double' remained always on the farm." The Lord Chief Justice did not think that either of these distinctions affected the principle of the case. Mr. Brown showed conclusively, in my opinion, that in the Scotch case the assessment was, as a matter of fact, made only in respect of services off the farm; but, as the Lord Chancellor has pointed out, every one of the Scotch Judges went out of his way to state that in his view it was immaterial whether the mares were brought to the stallion on the farm or the stallion was taken to the mares outside. The passage read from the judgment of Lord Buckmaster by the Lord

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(1) 55 Sc. L. R. 98; [1919] A. C. 463.

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Ronan L.J.

Chancellor shows, it seems to me, that he agreed with the view expressed by the Scotch Judges.

Mr. Brown endeavoured to distinguish this case from *Lockhart* v. *Malcolm*(1), on the ground that while there all the services were outside the owner's farm, here all the mares were brought to the farm and kept there for three months. We were informed that the payment for the keep of the mares was kept apart from the payment for the services of the stallion, and that it was on the payment for the services alone the assessment was made in this case. That appears to me to get rid of the distinction contended for by Mr. Brown. The Commissioners found practically, in the words of the Lord Chief Justice, that "the ordinary user is that of a stud farm; but entirely apart from that there is the extra and additional profit consisting of the letting out of the services of the animal, and in respect of this an assessment under Schedule D can be made." With that, and with what the Lord Chancellor has said, I agree.

O'CONNOR L.J.:—

Prima facie, at any rate, the hiring of the services of a stallion is a business; it is, too, a business not necessarily connected with a farm. In this case the appellant, in effect, says that because she carries on the hiring on a farm, and because the use of the farm renders the hiring more convenient, more safe, and more profitable, the hiring ceases to be a business, and becomes mere farming. I entirely fail to follow that contention. The inference of fact drawn by the Income Tax Commissioners is, in substance, this: that the farm is used as an adjunct to or ancillary to the stallion business. That seems to me to be a perfectly correct inference. In other words, the profits which the appellant makes are not profits derived from her occupation of a farm, but are, mainly at any rate, derived from the possession and use of a highly bred and valuable stallion.

Of course, if the appellant were charged with, first, income tax on the occupation of the farm, and, second, the full receipts coming to her, not merely from service fees, but also for the feeding and keep of the mares during the periods for which, under the appellant's system, they are kept on the farm, that would be unjust. The subject cannot be taxed twice over in respect of the same subject-matter; and I asked counsel for the appellant did they contend that the Commissioners had not taken sufficiently into account the use of the farm as such in swelling the profits. But counsel for the appellant expressly admitted that, assuming the Commissioners to be right in treating the stallion business under Schedule D, they have made all proper and necessary deductions from the gross receipts of the appellant in respect thereof.

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(1) 55 Sc. L. R. 98; [1919] A. C. 463.

I agree that the appeal should be dismissed.

Solicitor for the appellant: *Richard Martin.*

Solicitors for the respondent: *Sellors & Co.*

C. L.

K. B. Div.
1920.
April 16.

IN THE MATTER OF THE BANKRUPTCY (IRELAND) AMENDMENT ACT, 1872, AND IN THE MATTER OF THE INSOLVENT ESTATE OF EDWARD FRANCIS BOLTON, OF CAPE TOWN, IN THE UNION OF SOUTH AFRICA.

Bankruptcy Amendment (*Ireland*) *Act*, 1872 (35 & 36 *Vict. c.* 58), *sect.* 71—*Insolvency in Union of South Africa—Vesting land in Ireland in trustee appointed by South African Court—Jurisdiction—Creditors in Ireland—Form of order.*

By an order of the Supreme Court of the Union of South Africa, made under the Insolvency Act, 1916, of the Union of South Africa, the estate of an insolvent was sequestrated for the benefit of his creditors; subsequently a trustee of the estate was elected, and was declared entitled to administer the estate in accordance with the said Act. The insolvent was entitled to certain freehold and leasehold property in Ireland. Under the law of the Union of South Africa the trustee was entitled to the immovable property of the insolvent situate in Ireland, so far as such right did not conflict with the law in Ireland. The Supreme Court of South Africa having requested the Irish Courts to act in its aid, the trustee applied for an order vesting the said property in him.

Held, that he was entitled to such order.

MOTION.

By an order made on the 15th August, 1918, by the Supreme Court of the Union of South Africa (Cape of Good Hope Provincial Division), under the Insolvency Act (No. 32) of 1916, of the Union of South Africa, the estate of Edward Francis Bolton, of Cape Town, in the Province of the Cape of Good Hope, was sequestrated for the benefit of his creditors. On the 6th September, 1918, Alexander Mitchell Souter was elected trustee of the insolvent estate, and was declared entitled to administer the estate in accordance with the provisions of the said Insolvency Act. It appeared from the affidavit of a member of the Bar of the Supreme Court of the Union of South Africa that, according to the law of the Province of the Cape of Good Hope, Alexander M. Souter as trustee of the insolvent estate was entitled to the immovable property of the insolvent situated in Ireland, in so far as such right did not

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conflict with the law or the policy of the law of Ireland. The insolvent was entitled to an undivided share in certain freehold and leasehold house property in Ireland. By an order made on 11th November, 1918, by the Supreme Court of South Africa, it was ordered that aid be sought from the Courts in Ireland, requesting the said Courts, and especially such Courts as have jurisdiction in bankruptcy, to act in aid of and be auxiliary to the Supreme Court of the Union of South Africa, for the purpose of recognizing the appointment of the said trustee of the estate and effects of the insolvent and his title to administer the same, and generally to exercise the like jurisdiction which the Supreme Court of the Union of South Africa could exercise in regard to the matter and similar matters within the said Court's jurisdiction.

Ellison, for the trustee of the insolvent estate, applied for an order under the Bankruptcy Amendment (Ireland) Act, 1872 (35 & 36 Vict. c. 58), s. 71, vesting in the trustee all the estate and interest of the insolvent in the property specified in the notice of motion, and all rents thereof due to or in the hands of agents in Ireland of the insolvent, and all other the real and personal estate in Ireland of the insolvent. He referred to *Re Levy's Trusts* (1); *Ex parte Knight, re Firbank* (2).

Collis and Ward, solicitors for the persons entitled to the remaining undivided shares of the said property.

Dodd J.:—

The matter is entirely new, and arises upon the construction of one section of the Act of Parliament in force in this country, and upon the general principles to be found in the Roman law, and the Dutch law, and the British law. As regards the matters involved in this case, the difficulty arises from the use of words more than from anything else. The word "bankruptcy" is a word well known in the English language. It has, as far as I know or can remember, no equivalent in the Roman law or the Dutch law. The word "insolvent" is a word known to the Dutch law, and is an interpretation in the Dutch law of the old Roman law of cessio bonorum. A bankrupt in British phraseology meant a man who had broken his bench, and had indicated thereby that he had not enough money to pay his creditors, and in our vocabulary up till 1872 was applicable to a trader only. The word "insolvent" was applied to a person, not a trader, who was unable to pay his debts. And from the time of Henry VIII, when relief was granted to bankrupts—that is, traders—and from the time of Queen Elizabeth, when a certain measure of relief was given to other persons unable to pay their debts who were not traders, the words "bankruptcy" and "insolvency" have a definite and legal meaning. A bankrupt was, when he got his discharge, relieved from his debts; an insolvent was only released from gaol.

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(1) 30 Ch. D. 119.

(2) 4 Mor. 50.

There is no definition in any of the Acts that I can remember at present of the word "bankruptcy," and there is no definition in any of the Acts that I can remember at present of the word "insolvency." There is a definition of the word "bankrupt," and there is a definition of the word "insolvent," but that is confined to British law, and, more than that, to British statute law. The definition of the word "insolvent" in the Act of 1857 (20 & 21 Vict. c. 60) is as follows:—"'Insolvent' shall mean any person who shall file a petition for his discharge as an insolvent debtor, or against whom a creditor shall file a petition of insolvency pursuant to this Act." The word "bankrupt" is defined in the Act of 1857 as follows:—"'Bankrupt' shall mean any person who on any petition of bankruptcy shall have been adjudged by the Court to have been a bankrupt." So that an adjudication by the Court is necessary in this country before a man becomes a bankrupt, and while there is no definition of the word "bankrupt" save in so far as it is contained in the interpretation clause, sect. 4 of 20 & 21 Vict. c. 60, as being a person who had been adjudged by the Court to be a bankrupt, Acts of bankruptcy are set forth, and set forth with great particularity, in the Act of 1872; and the word "bankrupt" there, if I am to interpret it literally, means a person who has been guilty of any of the acts of bankruptcy set forth in the statute, and has been adjudged, by reason of an act of bankruptcy, to be a bankrupt, and then, and not till then, does the status of bankruptcy arise. Roman law never established any distinction between traders and non-traders—in other words, between bankruptcy and insolvency (cf. 1875, Poste Gaius, iii, 342).

While the whole of sect. 71 of the Act of 1872, to which I have been referred, uses words that are understood in one sense in the British law—an artificial law created by the Legislature in England—it uses those as applicable to the entire of the British Dominions, and they must get an interpretation bringing them within reasonable intendment as to what the Legislature meant. Sect 71 reads as follows:—

> The Court and the Courts having jurisdiction in England and Scotland, and every British Court elsewhere having jurisdiction in bankruptcy or insolvency, and the officers of such Courts respectively, shall severally act in aid of and be auxiliary to each other *in all matters of bankruptcy*, and an order of the Court seeking aid, together with a request to another of the said Courts, shall be deemed sufficient to enable the latter Court to exercise, in regard to the matters directed by such order, the like jurisdiction which the Court which made the request, as well as the Court to which the request is made, could exercise in regard to similar matters within the respective jurisdictions.

The word "insolvency" is used there obviously for the purpose of recognizing that what is bankruptcy in the British Courts may be insolvency in a Colonial Court, and the section of the Act calls on the Courts to aid each other. I am asked to aid the Court in South Africa, and I am supplied with all the materials that any Judge could be supplied with. I have the opinion of the eminent counsel who has presented the law to me from South Africa. But I have also before me a printed copy of the Act, and, though the interpretation of that Act is in one sense entirely a matter for adjudication upon a delivered opinion by an expert in the Colonies, I cannot overlook the fact that in so far as it is necessary for me to decide what insolvency in South Africa means, it is within my right to refer to this statute of South Africa, being guided, of course, in my interpretation of that statute by the expert opinion of the legal gentleman who has furnished me with his opinion. I would do the same in interpreting a Scottish statute. Having the statute, and having the opinion of the barrister, I am then in a position to know what the word "insolvency" means in South Africa.

Now, the whole of the Act is before me. It is an Act to consolidate and amend the laws relating to the administration of insolvent and assigned estates. The word "bankrupt" does not appear from beginning to end. I have gone through it with care. There is no suggestion at all of the word "bankrupt" in the whole code. The Act deals with the property of an insolvent precisely as the Courts in this country would deal with the property of a bankrupt. What the word "insolvency" then means in the comity of nations, as distinguished from the system in force in this country, is not hard to ascertain, and we get a lucid exposition of the Roman law from the very eminent counsel who has furnished me with his opinion. He has been qualified for a length of time, and has written a leading book upon the subject, and he refers to a number of authorities, which I will accept from him on his authority. It is not without interest, and it is not without importance, to draw attention to the fact that the statute relating to insolvency in South Africa that I have referred to is printed both in English and in Dutch. Now, insolvency in the Roman-Dutch Law—for the Dutch held on more to the Roman law than any other country perhaps, except Scotland—was founded on the cessio bonorum and missio in possessionem of the Romans, and it is clear that under the Roman law the former was a surrender, and the latter a seizure, of all the debtor's proprietary rights in lieu of execution against his person. In other words, all the debtor's property was substituted for his person in satisfaction of his creditor's claims; and this was the view of the Roman-Dutch law as well, which also prevails, and has been adopted and acted upon, in the Act of the Union of South Africa.

Included in the debtor's property, of which he was deprived on insolvency, were such assets as were situated in a foreign jurisdiction. I have no hesitation, therefore, in holding that "bankruptcy matters" in sect. 71 includes "insolvency matters" in the South African code. That this is not a strained meaning appears from the definition in the Trustee Act, 1893 (56 & 57 Vict. c. 53), sect. 50: "In this Act, unless the context otherwise requires, the expression 'bankrupt' includes in Ireland insolvent."

There lies at the root of the whole matter the old well-known principle of comity of nations and comity of independent jurisdictions within the same nation. A judgment pronounced by this Court could not formerly have been levied in Britain, but by the Judgments Extension Act and the comity which exists between England and Ireland a judgment of the Court in England can be made a judgment of our Court for the benefit of the English creditor, and in the same way a judgment of our Court can be realized in England or Scotland. This is merely carrying into effect the comity which binds together all the members of the great British Commonwealth of nations.

But I think I am required to do more than merely grant the application for a vesting order. The trustee would find that would carry him but a short way to realizing the assets in this country, and therefore I place at his service, as required by the section, the machinery of this Court to be used in aid of, and auxiliary to, the Court of South Africa as fully as it could be used in the case of a bankruptcy in this country. At the same time, I must have regard to the interests of creditors in this country, if any there be, who, by virtue of my order, might be sent far afield unless some such provision is made. I must have regard also to the interests of the other beneficiaries. The trustee may need the help of this Court in matters of controversy. The interest of the insolvent is apparently in some of the property held on some kind of joint tenancy with others who are represented before me. Landlords may be entitled to call on the trustee for rent or to elect. I cannot anticipate all matters that may arise in the course of realization. But obviously such matters can only be decided in this country. It is for the benefit of everyone to make provision for the final determination of any matter in controversy. If such applications occurred more frequently, it would be necessary to have rules of Court made; but the procedure being novel, all I can do is to frame as carefully as I can regulations for the guidance of the trustee and the Court, such as would be provided by rules of Court, and so discharge the duty cast upon this Court of aiding the Court in South Africa. Of course, any of these regulations that may not be in aid can be amended, or altered, or rescinded, on proper application, and on reasonable grounds, by the Judge of this Court. But the Official Assignee will act as the auxiliary officer of the trustee, and the whole matter is subject to the control of the South African Court.

The vesting order, however, should be, I think, in a document by itself, for conveyancing reasons, and the order I make so provides. Counsel for the trustee will see to this.

The regulations are for the assistance of the Courts, and in no way by way of conditions affecting a purchaser.

The Order was as follows:—

The Court, recognizing the appointment of the said Alexander Mitchell Souter as sole trustee of the estate and effects of the said Edward Francis Bolton, the insolvent, and his title to administer the same, doth order and declare that all the estate and interest and shares of the said Edward Francis Bolton in the following property, that is to say—(1) No. 15 North Earl Street, Dublin; (2) Nos. 88 and 89 Marlborough Street, Dublin; (3) Nos. 51 and 52 Marlborough Street, Dublin; (4) Nos. 47, 48, 49, and 50 Marlborough Street, Dublin; (5) Nos. 40, 41, 42, 43, and 44 Upper Gloucester Street, Dublin; (6) Nos. 36, 37, 38, and 39 Upper Gloucester Street, Dublin; (7) Nos. 33, 34, and 35 Upper Gloucester Street, Dublin; (8) Nos. 3, 4, 5, and 6 Portland Place, Dublin; (9) No. 29 William's Place, Dublin; (10) No. 9 St. James's Terrace, Malahide (whereof the premises included under Nos. 1, 2, and 10 comprise real estate, and the remaining premises comprise chattel real), and any of the rents that are now due or in the hands of the agents in Ireland of the said Edward Francis Bolton, the insolvent, and all other real and personal estate in Ireland of the said Edward Francis Bolton, the insolvent, are vested in the said Alexander Mitchell Souter as sole trustee of the said Edward Francis Bolton, the insolvent; and it is ordered that, for the purpose of realizing the estate of the said insolvent in Ireland for the benefit of his creditors, and generally for the purpose of carrying into effect the Order of the Supreme Court of South Africa (Cape of Good Hope, Provincial Division), made in this matter and dated the 11th day of November, 1918, this Court and the officers thereof do act in aid of, and be auxiliary to, the Supreme Court of South Africa, subject to the following regulations:—

1. That a vesting order shall be drawn up and sealed under the seal of the Court in such form as counsel for the said Alexander Mitchell Souter, the trustee, may approve, so as to be capable of being recorded or registered in accordance with the law in Ireland, and that all things be done, so far as this Court can do, to enable the said trustee to make title to any portion of the lands of the insolvent, and specially that a condition be inserted in the conditions of sale to the effect that a certified copy of the order of the Supreme Court of South Africa (final order on rule nisi, dated 15th August, 1918) and a certified copy of the vesting order of this Court be accepted by the purchaser as conclusive evidence that all things were rightly done in the Supreme Court of South Africa and in this Court, and that copies on the usual terms be furnished by this Court.

2. That the Official Assignee do act in aid of the trustee, as in sect. 71 of the Bankruptcy (Ireland) Amendment Act, 1872, as nearly as may be as if the insolvent had been adjudicated a bankrupt in this Court, and that the Official Assignee do serve such notices and do have such sittings as may be necessary, and that the creditors in Ireland be at liberty to prove their debts in this Court.

3. That any matters in controversy between the trustee and any person resident in Ireland in his winding up of the estate be determined in this Court.

4. That the trustee out of the assets do supply to the Official Assignee of this Court for distribution to the creditors such composition or dividend as may be payable on distribution to the creditors in the Union of South Africa.

5. That the trustee do submit to the jurisdiction of this Court in all such matters, and abide by any order this Court may make, subject to appeal in accordance with the provisions of the rules and orders of the Supreme Court of Judicature in Ireland, and that the law applicable to the decision of such matters be the law of Ireland.

6. Before taking the proceeds of the sale of the insolvent's property out of Ireland the trustee shall lodge, if so ordered, such sum as the Court may on the application of the Official Assignee direct.

7. The trustee shall appoint a solicitor or firm of solicitors in this country on whom any notice of motion, writ, or summons, or other process may be served.

8. That the trustee be entitled to and paid his costs of this motion, and that Messrs. Collis & Ward be entitled to and paid their costs of attending hereon, out of the estate when taxed and ascertained.

9. That the trustee be at liberty to apply to the Court to alter, or amend, or rescind any of these regulations.

By the Court,
R. G. Daniell,
Registrar.

Note.—It is requested by the Court that the trustee do cause the insolvent to be served with a copy of this order forthwith, together with an intimation that the insolvent is at liberty to apply to the Court to review, vary, or rescind the whole or any portion of this order, or to appeal from same.

R. G. Daniell,
Registrar.

Solicitors for the applicant: *Hamilton & Craig.*

D. M. S.

K. B. Div.
(Probate.)
1920.
May 14.
June 3.

IN THE GOODS OF COLEMAN, OTHERWISE VODREY.

Probate—Soldier's will—Postcard and letter—Whether testamentary or not—Death after demobilization—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 11.

The deceased on mobilization wrote a postcard to his cousin (the applicant) directing the latter, in the event of his death, to inquire of his regimental company for anything left behind. While on active service in France he wrote to the same cousin a letter saying (inter alia) that, if anything happened to him, his cousin could "claim all belongs to me, because it is in my will." The deceased died after demobilization.

Held, first, that the postcard and letter taken together constituted a good soldier's will, within s. 11 of 1 Vict. c. 26, and that the applicant as universal legatee thereunder was entitled to administration of the deceased's estate, with the will annexed.

And secondly, that a return to civil life prior to death does not operate as a revocation of a soldier's will, in the absence of any expression of intention to the contrary in the document itself.

MOTION ON NOTICE.

About twenty-six years before his death John Coleman enlisted in the Royal Dublin Fusiliers under the assumed name of William Vodrey. On August 8th, 1914, being called up on mobilization, he wrote a postcard to his cousin, Joseph Coleman (the applicant), in the following words:—

"*August*, 1914.

"Dear Joe,—Just a line to let you know that I am going out to the front, and if I am pipped inquire to D Co., 2nd Royal Dublin Fusiliers, for anything I've left behind.

"W. VODREY.
"(Keep this card.)

"Witnesses:
"GEO. BOND,
"THOS. DOWNES."

The postcard was addressed to "Mr. J. Coleman, *Irish Times* office, Dublin, Ireland," was marked by deceased "on mobilization," and was posted at York on August 8th, 1914. Subsequently, IN THE GOODS OF COLEMAN.

on July 14th, 1917, he wrote a letter to the applicant containing the following sentence:—"If anything happends [sic] to me, you will see my name in your paper, and you can claim all belongs to me, because it is in my will." The handwriting of the deceased was proved by the affidavit of an independent witness, Philip Bates. The deceased subsequently joined the Labour Corps, was demobilized in June, 1919, and died on June 13th at Crooksling Sanatorium, County Dublin. The deceased was a bachelor, both of whose parents were dead. He left a half-brother, Joseph Coleman, and a half-sister, Esther Coleman, his sole next-of-kin him surviving. His assets consisted of arrears of army pay and about £70 in War Bonds. The applicant, Joseph Coleman, asked for a declaration that the postcard and letter constituted a good soldier's will, and that he should be declared entitled to administration with will annexed as universal legatee. The application was originally made ex parte, but the Court directed notice to be served on the next-of-kin, who duly appeared in Court, but made no claim, and took no part in the argument. The fullest search for any other will was made, but without effect.

Tobias, for the applicant:—

First, it is submitted that the documents are testamentary in character. A testament is "the just sentence of our will, touching that we would have done after our death" (Swinburne on Testaments, p. 4). If the intention that the document is to operate after death is clear, it is testamentary; and, if the formalities are complied with, it will be admitted to probate: *Robertson* v. *Smith* (1). The word "pipped" is found in the new Oxford Dictionary as a colloquialism for "hit by a bullet." Further, the writer intended the postcard to be of some formality. Again, in the letter there is an obvious reference to death. The letter either is a reference to and confirmation of the postcard, or is supplemental to it. I submit that under the two documents the applicant is either universal legatee or executor according to the tenor. This Court is not concerned with the construction of the documents, but with the intention of the deceased. "The intentions of the deceased as to what instruments shall operate as

(1) 2 P. & D. 43.

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and compose his will are to be there [i.e., in the Court of Probate] collected from all the circumstances of the case taken together": per Sir J. Nicholl in *Greenough* v. *Martin* (1). If the documents are testamentary, they clearly form a good soldier's will under the authorities, and death after demobilization does not operate as a revocation: *In the Goods of Leese* (2). A universal legatee is entitled to administration cum test.: *In the Goods of Oliphant* (3).

Cur. adv. vult.

June 3.

KENNY J.:—

This case involves the consideration of the construction and effect of two documents in the handwriting of the deceased, which are alleged to constitute, either together or singly, a soldier's will within the exception contained in sect. 11 of the Wills Act, 1837. Of the two documents, one is a letter written on a postcard with the post-mark, "York, 8.45 p.m., August 8, 1914." The other is also a letter, dated the 14th July, 1917. Both are addressed to the applicant, Joseph Coleman, who was a cousin of the deceased, and, it is not unimportant to add, is a compositor on the staff of one of the Dublin newspapers. His application is for a grant of probate of these documents to him as executor according to the tenor; or, in the alternative, for a grant of administration, with this alleged will annexed, to him as universal legatee therein named. The deceased died on the 13th June, 1919. The application in the first instance was made ex parte, but I thought that the next-of-kin of the deceased should have an opportunity of considering the case, and I directed a special notice to be served on them. On the adjourned application they appeared in person, a brother and sister of the half-blood, and declined to employ legal advisers, on the ground, perhaps a wise one, that, the assets being comparatively small, it was not worth their while to incur expense in contesting the applicant's claim.

The circumstances of the case are these: The deceased John Coleman, son of one John Coleman, who was an uncle of the applicant, enlisted in the 2nd Royal Dublin Fusiliers over twenty-six years ago under the assumed name of William

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(1) 2 Add. 239. (2) 17 Jur. 217. (3) 1 Sw. & Ir. 525.

Vodrey. It would seem that he never afterwards wholly discarded this name. One of the two letters I have referred to is signed "Wm. Vodrey," and his death is registered in the same name. The other letter is signed "J. Coleman," and the internal evidence afforded by it, supplemented as it is by the affidavit of the applicant, satisfies me as to the identity of the deceased. There can be no doubt that his real name was John Coleman.

There is no positive evidence of his movements in August, 1914, or from that month to July, 1917, save what may be inferred from the contents of the postcard letter of the 8th August, 1914. It bears the "York" post-mark,—is written in pencil,—is headed "On Mobilization,"—and is addressed to "Mr. J. Coleman, *Irish Times* Office, Dublin, Ireland." At the present time the contents are almost undecipherable, but the applicant deposes to the contents in an affidavit made at an earlier stage of the proceedings, when, I presume, the pencilling was fresher. The contents, as so deposed to, are as follow:—

"Dear Joe,—Just a line to let you know that I am going out to the front, and if I am pipped inquire to D Co., 2nd Royal Dublin Fusiliers, for anything I've left behind.

"W. Vodrey.

"(Keep this card.)

"Witnesses:
"Geo. Bond.
"Thos. Downes."

There was apparently no further communication from the deceased until the letter of the 14th July, 1917. The latter is addressed to "Dear Joe" (the applicant), and is dated "4. 7. 17,"—is signed "From your cousin, J. Coleman, somewhere in France," and—having stated, by way of excuse for not having kept an appointment some time previously, that he had received a telegram ordering him to join his unit and hold himself "in readiness for Expeditionary Force across the sea," the letter proceeded: "If anything happends [sic] to me, you will see my name in your paper, and you can claim all belongs to me, because it is in my will." Both letters are identified as being in the handwriting of the deceased, and there is a positive statement in the applicant's affidavit that the later of the two documents was "written from France, where deceased was serving at the time." The affidavit also refers to a bundle of letters written by the deceased to the applicant from the 15th August, 1917, and also states that in an interview with the deceased, in May or June, 1919, he informed the applicant that he had been "gassed," and was then about to be demobilized. He died, as I have said, on the 13th June, 1919, and it is stated that an exhaustive search for any will other than that contained in the two letters has been made, but without effect.

The questions that now arise are: (1) Do the two documents, or does either of them, constitute a soldier's will within the exception contained in the 11th section of the Wills Act, in the sense of having been written when the deceased was in actual military service? (2) If so, were they conditional on the deceased not surviving the particular expedition? (3) Should both documents be admitted to proof, or does the letter of July, 1917, supersede that of August, 1914? And (4) Is the applicant constituted executor according to the tenor?

On the first point,—as to these documents or either of them constituting a soldier's will,—I think I am justified in assuming that the deceased proceeded on actual military service after the writing of the postcard of the 8th August, 1914. War had then been declared between this country and Germany, and British troops were being hastily mobilized for service in France and Belgium, and the letter demonstrates that the deceased's regiment was being mobilized, and that he anticipated immediate departure for the front. A state of war existed, and the deceased, though not actually in the theatre of war at the date of the letter, must have been taking steps at his home station to join the expeditionary force. He was at the time, in substance, a member of the expeditionary force that subsequently embarked. It is quite settled that it is not essential to the validity of a soldier's will that he should be in the theatre of war at the time when he makes it. He must, no doubt, be in expéditione—in the sense that has been attributed to that expression in numerous authorities,—but he comes within it if he has taken some step, pursuant to order, preparatory to joining the forces in the field. The law on this point received much consideration from Sir F. Jeune in his judgments in *Hiscock's Case* (1) and *Gattward* v. *Knee* (2). In the former the step taken by the deceased was the going into barracks with a view of being drafted to the front, while in the latter it was held that mobilization might be taken as the commencement of the "expedition," whether the deceased himself took any step under it or not. See also *Re Godley* (3). I am, therefore, clearly of opinion that the deceased must be regarded as having been on actual military service when he wrote the letter of August, 1914. There is no difficulty about the letter of July, 1917. It purports to have been written from France, and shows on its face that the deceased was then also in actual military service.

The next question is whether the dispositions in the letters were dependent on the deceased dying while on actual service, or, in other words, whether the gift to the applicant was conditional on the deceased meeting his death in the course of the military service on which he was engaged. This question has been dealt with in many decided cases. In *Spratt's Case* (4) Sir F. Jeune reviews the authorities and suggests certain criteria for determining whether a will is conditional or not. Such criteria are not easy of application, and it seems to me that in doubtful cases the final test is whether an intention is disclosed in the document to confine its operation to a particular event or within a clearly expressed time. In the numerous cases where the conditional interpretation has been rejected many instances will be found of expressions pointing more directly to a limitation of event or time than are to be found in the documents in this case. In *Spratt's Case* (4), *Halford* v. *Halford* (5), *Gattward* v. *Knee* (2), and *Re Stuart* (6) there were weighty grounds for contending that the gift was contingent, yet the conditional interpretation was not upheld. The Court should lean against an intestacy, and general phrases indicating a limitation ought not to be scrutinized with too great nicety: see the judgment of Sir James Hannen in *Mayd's Case* (7), where the words

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(1) [1901] P. 78.

(2) [1902] P. 99.

(3) 41 I. L. T. R. 160.

(4) [1897] P. 28.

(5) [1897] P. 36.

(6) 21 L. R. Ir. 105.

(7) 6 Prob. D. 17.

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Kenny J.

of contingency were "in case of my death on the way." I hold, therefore, that neither of these documents is a conditional testament.

The remaining questions relate to the particular document or documents that should be admitted to proof and in what character a grant should be made to the applicant. In my opinion both letters ought to be regarded as constituting the will of the deceased. No other document of a testamentary or dispositive character has been found. But the deceased, in the letter of July, 1917, makes a reference to a will, and it may be that inasmuch as the postcard of August, 1914, purports to have been signed in the presence of witnesses, the deceased may have regarded it as a will, and therefore referred to it as such. No doubt the gifts in each document are in effect the same, but I think it is safer to extend the grant to both letters.

I cannot hold that the applicant is executor according to the tenor. There is nothing to indicate that he was clothed with any trust or power of management, or that he was to occupy a position other than that of beneficial universal legatee without any executorial duties: see *Re M'Kane* (1), where the subject is discussed. I do not regret having arrived at this conclusion inasmuch as he will have to give security if he takes the grant. If the grant were made to him in the character of executor according to the tenor security would not be required.

Solicitors for the applicant: *Collis & Ward.*

T. C. T.

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(1) 21 L. R. Ir. 1.

REX *v.* GARDINER.
(1919. No. 396.)

K. B. Div.
1920.
Feb. 26.

Revenue—Practice—Issue and service of writ out of the jurisdiction—R.S.C., 1905, Order 68 (Revenue)—Leave of Court.

A writ of subpœna for the commencement of an action on the Revenue side was issued by the Commissioners of Inland Revenue against a defendant resident in England. The defendant was served in England, but did not enter an appearance. The Commissioners applied to the proper officer for a certificate of the defendant's default for the purpose of having the same transmitted to England, pursuant to sect. 23, sub-s. 2, of the Inland Revenue Regulation Act, 1890. This certificate was refused.

Held, that the certificate was properly refused, as the writ had not been issued and served in accordance with R.S.C., 1905, Order 68 (Revenue). The leave of the Court for the issue and service of the writ should have been obtained.

Ex parte Application on behalf of the Commissioners of Inland Revenue for a direction that a certificate of the defendant's default of appearance be issued by the proper officer in an action brought by the Commissioners against Devonshire P. H. Gardiner as an accountable party for estate duty and succession duty on the death of Elizabeth Clarges Gardiner, deceased.

The facts, as stated by counsel, were as follows:—The Commissioners of Inland Revenue have a claim against an owner of land situate in Ireland in respect of estate duty and succession duty. The owner is resident in England.

The Commissioners issued out of this Court a writ of subpœna for the commencement of an action on the Revenue side. The defendant was served with a writ in England. He has not appeared according to the exigency of the writ, and the Commissioners applied to the officer for a certificate of the defendant's default, for the purpose of having it transmitted to the High Court in England, being the jurisdiction in which the service took place, pursuant to sect. 23, sub-s. 2, of the Inland Revenue Regulation Act, 1890. The officer refused to issue such a certificate without reference to the Court, since he had doubts as to the proper service of the writ of subpœna in the circumstances of the case, having regard to the orders and rules.

Wylie K.C. (with him *G. W. Shannon*), for the Commissioners.

MOORE J.:—

[His Lordship having stated the facts as above set out, proceeded:—]

If the writ of subpœna was, firstly, properly issued, and, secondly, properly served, the defendant is in default. If otherwise, then he is not.

I accept without further inquiry Mr. Wylie's admission that this proceeding comes within R.S.C., 1905, Order 68 (Revenue), as one which previously to the commencement of the principal Act might have been commenced by information in the Court of Exchequer in Ireland; and under the definition clause of rule 3 (*a*) of that order "writ of summons" is to include "writ of subpœna for the commencement of an action."

By rule 3 of the order, the Judicature Orders, with certain specified exceptions, are to apply to Revenue actions such as the present. Let us see then what the orders are with reference (*a*) to the issue, and (*b*) to the service of an originating writ for service out of the jurisdiction. Prima facie when the relations inter se of Irish, English, or Scotch Courts are considered, there is no jurisdiction in any of them to allow issue of process out of their respective jurisdictions for service in another of them, except by statutory enactment or rules having like effect: see Collins M.R., *Kasch & Co.* v. *Wulfert* (1). I agree with Mr. Wylie that the Irish Order 11 (service out of the jurisdiction) is closely dependent, and must be read with Order 2 (writ of summons and procedure).

By Order 2, rule 5, no writ of summons for service out of the jurisdiction shall be issued without leave of the Court or Judge. By Order 11, rules 4 and 5, an application for liberty to serve a writ out of the jurisdiction must be made to the Court before the issue of such writ.

In the present case no application for leave to issue the writ nor for leave to serve it out of the jurisdiction was made. Mr. Wylie contends that it was not necessary to make either application on two grounds: the first, that Order 2, rule 5, does not apply to Revenue proceedings. He says that Order 68 contains a special code for service out of the jurisdiction in its rules (5 and 6), which by implication excludes the application of Order 2. I do not think that this is so. Such code is not exhaustive. Rules 5 and 6 apply to the case of service outside England or Scotland on a person who is a British subject (rule 5), and on a person who is not a British subject (rule 6), and in each case the leave of the Court has to be obtained.

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(1) [1904] 1 K. B., at p. 121.

The fact that the case of a British subject in England or Scotland is not provided for by Order 68 or its rules is, to my mind, rather in support of an inference that the case is already provided for by some other Order, or in some other way, and I see nothing inconsistent between these Revenue rules of Order 68 and Order 2, rule 5. Mr. Wylie has also argued, by reference to rule 76, that the special application of the several orders named there impliedly excludes the application of the others—Order 2 among the number—to Revenue cases. I think he is justified in saying that rule 3 was drafted on the basis that all Orders applied to Revenue cases except those therein named, and that rule 76 is consistent only with the view that no Orders were to apply except those there set out; and there is undoubtedly so far an inconsistency between the schemes of the two rules. Probably owing to more careful drafting this inconsistency does not exist in the corresponding English Order 68. But I do not find in such inconsistency, however it arises, enough to enable me to override the express words of rule 3, that, save as otherwise provided, "these orders," so far as applicable, are to apply to Revenue proceedings. I therefore hold that Order 2, rule 5, governs the present case.

Mr. Wylie then contends that, assuming such order and rule would otherwise apply, the Commissioners are empowered to act as they have done under sect. 23, sub-s. 1, of the Inland Revenue Regulation Act of 1890, which I find is still in force. That section provides that "any writ of subpœna . . . issued out of the High Court . . . may be served on any person in any part of the United Kingdom." As regards this, it obviously does not give any special right to the Commissioners as to the issue of the writ. That is unaffected, and must still remain subject to Order 2, rule 5, to make it a writ legally issued. As regards the service of the writ, there is perhaps more difficulty.

The proceedings are in the High Court, and I think, therefore, subject to its Orders and rules, save where otherwise expressed. The High Court Orders could, if it were desired, exclude writs in Revenue actions from their purview; but they have not done so, nor has the statute excluded the High Court Orders. I think there is nothing in this section necessarily inconsistent with Order 11, rule 5, and that it applies. The effect of the section appears to me to be intended to enable such a writ to be served in England and Scotland (or Ireland) as an additional cause of action to those severally enumerated in our Order 11. But this still requires the leave of a Judge. At present, were it not for that section, it might be impossible for the Inland Revenue, under the Orders of the English High Court—much more limited than our own—to serve an intended defendant in Ireland for such a cause of action at all. There is really little substance in the grievance, as the Inland Revenue Commissioners are themselves technically resident in each of the jurisdictions, and, except for the purposes of such international book-keeping credits as Mr. Wylie refers to, they can always without leave follow the intended defendant in the jurisdiction in which he resides by becoming plaintiffs there.

I am of opinion that leave of the Court should have been obtained before the issue of the writ of subpœna (*a*) for its issue, and (*b*) for its service out of the jurisdiction, and, therefore, that the officer was right in refusing to issue the certificate, and that the defendant is not in default by reason of not having appeared to an invalid process against him. As there is no motion to set the proceedings aside, I say nothing more.

Solicitor for the Commissioners of Inland Revenue: *Richard Martin.*

H. H.

[House of Lords.]

H. L. (Ir.)
1920.
April 17.

WHITE'S DIVORCE BILL. (No. 1.)

Petition to sue in forma pauperis—Delay in taking proceedings.

In a proper case the House of Lords will allow a petitioner in a Divorce Bill to prosecute his bill in forma pauperis.

George Alfred White petitioned the House that he may be admitted to prosecute his Bill in forma pauperis.

Mr. Scanlon (of the Irish and English Bars), for the petitioner, read an affidavit sworn by the petitioner showing that the petitioner was a motor-mechanic, and had not goods or chattels worth £5. The truth of this affidavit was certified by the rector and churchwardens of the parish where the petitioner resided, and also by two Justices of the Peace.

The House (Lord Birkenhead L.C., Viscount Finlay, Viscount Cave, Lord Atkinson, and Lord Shaw of Dunfermline) held that the petitioner had shown good cause why he should be admitted to sue in forma pauperis.

Second Reading.

A petitioner from poverty was unable to take proceedings for a divorce a vinculo for about ten years, when he heard he might be allowed to sue in forma pauperis. It was proved that the petitioner was a motor-mechanic, now earning about £3 a week; but ten years ago was only earning 30*s.* or £2 a week.

The House (Lord Birkenhead L.C., Viscount Finlay, Viscount Cave, Lord Atkinson, and Lord Shaw of Dunfermline) held that delay was not a fatal bar, and that the evidence showed it was not the fault of the petitioner that proceedings for a divorce a vinculo were not taken earlier.

Mr. Scanlon, for the petitioner, stated that the petitioner, George Alfred White, a motor-mechanic, was married to the respondent, Blanche White, in January, 1907; that in April, 1907, the respondent refused to cohabit with the petitioner, who, since that date, had not cohabited with her; that there was no issue

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of the marriage; that on the 8th July, 1910, the respondent was delivered of a male child, of which the petitioner was not the father; that the petitioner on the 20th October, 1910, presented a petition in the High Court of Justice in Ireland, King's Bench Division (Matrimonial), charging his wife with having committed adultery with some person unknown; and that on the 2nd February, 1911, the petitioner obtained a decree of divorce a mensa et thoro.

The adultery was clearly proved, and the petitioner was examined as to the delay in allowing so long an interval to elapse before applying for a divorce a vinculo. He stated that he was a very poor man, now earning about £3 a week, but in 1910–11 only earning 30*s.* or £2; and that, although he knew he could proceed by way of the Legislature to obtain freedom, he did not know until about nine months ago that he might be allowed to prosecute his Bill in forma pauperis.

Mr. Scanlon cited the case of *Mr. Warr*, 1840 (1).

[VISCOUNT FINLAY—That is not such a strong case as this; as there no action of law had been brought, whereas here an action of law had been taken immediately on the petitioner's knowledge of the birth of a child.]

LORD BIRKENHEAD L.C. said: "Mr. Scanlon, the practice of their Lordships in cases of long delay, such as is found in this case, is not to sanction the proceedings unless it is clearly shown that the delay was not due to negligence on the part of the petitioner; and those who take advantage of these proceedings ought clearly to understand that that practice will be insisted on as it has been in the past.

"The circumstances which have been proved by the petitioner in this case, in the opinion of their Lordships, bring him within the principle which I have indicated: that delay, if suitably explained, is not a fatal bar."

Moved: That the Bill be now read a second time. Agreed to. Bill read a second time accordingly.

HOUSE OF LORDS' MINUTES, 22*nd April*, 1920.

Agent for the petitioner: *Herbert Z. Deane*, London, for *P. S. Connolly & Co.*, Limerick.

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(1) Macqueen's Appellate Jurisdiction of the House of Lords, p. 666.

[House of Lords.]

CARBERY DIVORCE BILL.

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1920.
April 22.

Evidence on Commission—Attendance of witnesses dispensed with.

The House gave leave (12 March, 1920) for evidence taken on commission to be read, and dispensed with the attendance of the witnesses examined on commission.

This was a petition by Jose Baroness Carbery for a divorce a vinculo of her marriage with John Baron Carbery, of Castle Freke, County Cork.

Serjeant Sullivan K.C., and the *Hon. Victor Russell*, appeared for the petitioner.

Mr. Bucknill held a watching brief for the respondent.

It appeared that the petitioner was married to the respondent in 1913. In that year they went to Nyeri Nairobi, British East Africa. The petitioner had no female attendant, and had to ride long distances, although in a delicate state of health, and her husband lost his temper on several occasions. In June of the following year she was in her father's house in London, and in the course of a dispute her husband struck her on the face. In 1915 there was a second visit to Africa, where she lived in a grass hut, and had malaria, and was attended by black boys only. In 1916 a daughter was born. In April, 1918, there was a third visit to Africa. There was a house built by that time, and the petitioner was accompanied by a maid. During the visit the petitioner and her husband had disputes, and her husband struck her several blows with a sjambok. In July, 1919, the petitioner's husband left her to go to the Continent; and, in consequence of information of her husband's adultery in Paris, she filed her petition in the Irish Courts.

The evidence showed that in September, 1919, the High Court in Ireland ordered that a commission should issue for the examination of Louis Nicollier, Caroline Mon, and Francine Chewin,

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and other persons, all residing in Paris; that the evidence of Leon Leoni, of Louis Nicollier, Joseph Brunner, and Joseph Coxon, Paris, was duly taken and received in evidence in the petitioner's suit for divorce. As it appeared that there were no means whereby the attendance of the said Leon Leoni, Louis Nicollier, Joseph Brunner, and Joseph Coxon could be secured at the Bar of the House of Lords on the second reading, and that the petitioner was advised that their evidence was essential to establish the truth of the allegations in the Bill, their testimony forming a considerable portion of the evidence proving the adultery, a petition was lodged that the above evidence might be read, although already on the Table of the House.

On the 12th March, 1920, the petition was granted, and the evidence taken on commission was now read. There was also evidence given by Reuben Butler, of Messrs. Littlechild & Co., inquiry agents, who watched the respondent and a female, not the petitioner, going about together in Paris; and the petitioner's father said on oath that the respondent had admitted being unfaithful to the petitioner. Evidence was also given as to the cruelty.

The House (Lord Birkenhead L.C., Viscount Finlay, Viscount Cave, Lord Atkinson, and Lord Shaw of Dunfermline) ordered the second reading of the Bill, which was then read a second time.

HOUSE OF LORDS' MINUTES, 22*nd April*, 1920.

Agents for petitioner: *Charles Russell & Co*, Norfolk Street, London.

Agents for the respondent: *Lewis & Lewis*, Ely Place, London.

R. (ROONEY) *v.* THE LOCAL GOVERNMENT BOARD FOR IRELAND (1).

K. B. Div.
1920.
May 17, 19.
Appeal.
June 9.

Old age Pension—Disallowance—Means of pensioner—"Yearly value of any benefit or privilege enjoyed"—8 *Edw.* 7, *c.* 40, *s.* 4, *sub-s.* 1 (*d*), *and s.* 7; 1 *Geo.* 5, *c.* 16, *s.* 6.

An old age pensioner through infirmity and old age sought admission to the Hospice for the Dying, and was received and maintained free of charge in that institution from 11th July, 1919, to the 3rd October, 1919, on which later date he was discharged.

The average cost of maintenance in that institution was stated to be from 25*s.* to 28*s.* per week, and the total cost of the patient's maintenance during the period he was a patient of the Hospice did not therefore exceed the statutory limit of £31 10*s.* Save his pension, the pensioner had no means.

The Local Pensions Officer, having raised a "question" as to whether the pensioner was entitled to any pension, the Local Pensions Committee decided that he was not so entitled, and that decision was affirmed by the Local Government Board in respect of the period during which the pensioner was maintained in the Hospice, on the ground that "the value of the privilege which the pensioner enjoyed exceeded the statutory limit of £31 10*s.*"

On an application for a writ of certiorari to quash this decision, and for a mandamus to the Local Government Board to hear and determine the appeal according to law: *Held*, 1, that the benefit enjoyed by the prosecutor, being casual and temporary, did not come within the statutory description "the yearly value of any benefit or privilege"; 2, that the decision of the Board, being good on its face and within jurisdiction, and made by the statute "final and conclusive," was not the subject of certiorari and mandamus; 3, that the Board was not bound by its previous decision, "though final and conclusive," as regards external authorities.

Certiorari and Mandamus.

Motion on notice for an order for a writ of certiorari to remove into this Court for the purpose of being quashed a decision of the Local Government Board for Ireland, dated the 19th November, 1919, given on the appeal of the prosecutor from a decision of the Rathmines Old Age Pensions Committee, and for an order for a writ of mandamus directing the said Board to hear and determine the said appeal according to law.

On 30th September, 1912, the prosecutor made a claim for an old age pension to the North Dublin Rural Sub-Committee of the

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(1) Before Gibson and Kenny JJ.

Local Pensions Committee of the County of Dublin, and by the decision of the sub-committee, dated 5th December, 1912, he was awarded a pension at the weekly rate of 2*s.*, commencing on the 6th December, 1912.

In the month of November the prosecutor raised a question before the said sub-committee as to whether he was not entitled to a pension at the weekly rate of 5*s.*, instead of at the weekly rate of 2*s.*, on the ground that his employment and earnings had ceased owing to old age and infirmity. The question was duly investigated by the pension officer for the area, who reported in favour of the pensioner's claim. The pensioner was accordingly awarded a pension at the weekly rate of 5*s.*, to commence on the 1st day of December, 1916.

The pensioner was duly paid the pension of 5*s.* per week until the 22nd day of December, 1916, on which date he received an additional allowance of 2*s.* 6*d.* per week, bringing the payment up to 7*s.* 6*d.* per week.

The pension and the additional allowance continued to be paid to the pensioner until the 8th August, 1919, on which date the pensioner's Order Book expired, and the payment of the pension was stopped until the 14th November, 1919. From the 11th July to the 3rd October, 1919, the pensioner was a patient in the Hospice for the Dying at Harold's Cross, and was maintained in that institution free of charge.

On the 26th September, 1919, the pensions officer for the pension area of Rathmines raised a question before the Rathmines Local Pensions Committee as to whether the prosecutor was from and including the 11th July, 1919, in receipt of a pension at a higher rate than that justified by his means, and, if so, at what rate the pension, if any, should have been paid.

The Rathmines Local Pensions Committee by their decision dated the 1st October, 1919, on the said question disallowed the pension, on the ground that the pensioner had not been entitled to any pension.

On the 14th October, 1919, the prosecutor served a notice of appeal on the Local Government Board for Ireland against the decision of the Local Pensions Committee, and informed the Board that he had left the Hospice for the Dying, and that he was since living at Baldoyle with his daughter, a widow, who had three young children to support.

On the 19th November, 1919, the Local Government Board made an Order in Form 12 of the First Schedule of the Old Age Pensions Regulations of the 17th August, 1911, the curial portion of which was as follows:—"It is determined that during the period commencing on the 11th July, 1919, and ending on the 3rd October, 1919, the pensioner was not entitled to any pension."

In an affidavit, filed on behalf of the prosecutor in support of the motion, the prosecutor swore that from the 22nd December, 1916, until he entered the Hospice for the Dying he had no means except the old age pension, nor had he any since he left the Hospice, for which latter period he had been supported by his daughter.

In the course of a correspondence which ensued between the solicitor for the applicant and the secretary of the Local Government Board, the latter stated in a letter of the 22nd January, 1920, that "the pension was disallowed on the ground that the value of the privileges which the pensioner enjoyed exceeded the statutory limit of £31 10*s*."

It appeared from a statement of the Reverend Superioress of the Hospice for the Dying that the average cost of maintenance in that institution was from 25*s*. to 28*s*. per week.

The motion was based on the following grounds, inter alia:—

(*a*) That the decision or order of the 19th November, 1919, was made without and in excess of jurisdiction, inasmuch as it was made not only without evidence that the prosecutor's yearly means exceeded the statutory limit of £31 10*s*., but in the face of the evidence that his yearly means were less than £20.

(*b*) That the Board had no jurisdiction to attribute to the prosecutor any other means than the said maintenance in the Hospice for the Dying, natural law and the statutory regulations made under the Old Age Pensions Act requiring that the Board's decision should be based on the best evidence reasonably obtainable.

(*c*) That the Board was wrong in law in calculating prosecutor's means at the yearly rate of the cost of his maintenance in the Hospice for the Dying instead of the cost for the actual period of his maintenance therein.

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Comyn K.C. and *Crowley*, for the prosecutor:—

The statutory conditions to enable an applicant to receive a pension are defined by sects. 1 and 2 of the 8 Edw. 7, c. 40. The third condition mentioned in sect. 2 is that the applicant must satisfy the pension authorities that his yearly means as calculated under the Act do not exceed £31 10*s*. The question for this Court is whether the Local Government Board in depriving Rooney of his pension for the period he was a patient in the Hospice exceeded their jurisdiction. The Board's jurisdiction was limited to "finding" whether the prosecutor continued to fulfil this condition. They admit that the value of his maintenance in the Hospice to the 26th September, the date of raising the question, was only £17 18*s*. 6*d*., and up to the 3rd October £19 12*s*. 3*d*., and that he had not either previously or since any other means.

The Board, therefore, found as a fact that his yearly means were less than £20—i.e., he continued to fulfil the statutory condition. The Board misconstrued the expression "yearly means." Their decision on the amount of his means was "final and conclusive." The Board in construing "yearly means" as "means at the yearly rate of" set up a new condition for entitling a person to a pension.

[Authorities cited and discussed:—*Bryson* v. *Lisnaskea Poor Law Guardians and the Local Government Board* (1); *Wexford County Council* v. *The Local Government Board* (2); *The King* v. *Plowright* (3); *The King* v. *Moreley* (4); *Re Penny* (5); *Powley* v. *The Local Government Board* (6); *Sinnott's Case* (7).]

Wylie K.C. (with him *Lipsett*), for the Local Government Board:—

The prosecutor was as much disqualified after the first week in the Hospice as at the end of the three months. He was in the enjoyment of a benefit which calculated for a year would bring him outside the statutory limit. Moreover, the right to a pension is lost by non-payment for three months, and more than three months have expired. He referred to 1 & 2 Geo. 5, c. 16, s. 5.

Cur. adv. vult.

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(1) [1918] 2 I. R. 258.
(2) [1902] 2 I. R. 349.
(3) 3 Mod. 95.
(4) 2 Burr. 1041.
(5) 7 E. & B. 660.
(6) [1910] 2 I. R. 440.
(7) [1910] 2 I. R. 403.

Gibson J.:—

This application for certiorari and mandamus in respect of a decision of the Local Government Board, dated 19th November, 1919, on appeal from the Pensions Committee's determination, dated October 1st, that the pensioner, Rooney, was not entitled to any pension for the period from 10th July, 1919, to October 3rd, 1919, is based on facts not in dispute, and which are to be taken (as Mr. Wylie agrees) as forming the ground of the adverse decision of the Local Government Board. Rooney, who was entitled to an old age pension of 7*s.* 6*d.* a week, was on 11th July, 1919, received into the Hospice for the Dying, which he left on October 3rd. The charity, as appears from an annual report before us, is intended for the poor, ineligible from their sinking state for ordinary hospitals, and the greater number of the sufferers die in the Hospice. The money value of the benefit enjoyed by Rooney up to 26th September, 1919, was £17 18*s.* 6*d.*, and up to October 3rd, when he quitted the Hospice, was £19 12*s.* 3*d.* Estimated on a yearly basis, the annual benefit, if enjoyed for a year, would have greatly exceeded the means entitling him to pension. The nature of the malady from which Rooney suffered was not proved, but it must be assumed that his condition was such that death might have been apprehended as a likely consequence. The Local Government Board held that the benefit enjoyed by Rooney in the Hospice was of a yearly value which disentitled him for the period of his stay there to pension, but since his discharge he has received his former pension as usual.

The first question for consideration, if the conclusion of the Local Government Board is at all open to review—a matter to be considered presently—is whether the benefit enjoyed by Rooney was such as came within the description "the yearly value of any benefit or privilege." Many illustrations were suggested during the argument showing difficulties in the way of any satisfactory exhaustive definition. I confine my attention to the particular facts before us. Clauses (*a*), (*b*), and (*c*) of sect. 4 of the Act of 1908 relate to yearly value of property and income contemplated as something continuing. The admission of Rooney to the Hospice was casual and temporary. A poor patient might die in a week; he might have been brought in insensible and in an apparently dying condition as the result of a street accident. The position of one taken in as an inmate for life, or probably for life, as in the Hospital for Incurables, or in an Old Men's Asylum, or a pauper lunatic in an asylum, would be quite different. Whether "the yearly value" described in the section would apply to an ordinary hospital patient whose actual stay in the hospital would represent in value £31 10*s.*, or who was in the hospital for a year, is a point upon which I do not express any opinion. It was strenuously argued by Mr. Wylie that a weekly benefit which, if prolonged for a year, would exceed £31 10*s.* disentitled the recipient of such benefit to pension for such week or weeks. The words "yearly value" seem to me to point to something supposed to have continuance; and I do not think that a sufferer casually received into the Hospice for the Dying, and who for a week or a few weeks enjoyed the charitable care of the sisters, could be properly described as within the description of a person enjoying a benefit of yearly value.

Assuming that the decision of the Board was incorrect, can this Court review such decision which the statute makes "final and conclusive"? The decision is by an administrative body on appeal, dealing with matters of uncertain character on which opinions may differ, and the volume of appeals, some 250 a week, according to Mr. Wylie, would make promptitude and finality desirable. The decision is on a question of fact, and may be conclusive, though error of law may be at its foundation. Thus what is "trade refuse" is a matter the legal construction of which in relation to particular facts has been the subject of many conflicting decisions; but the decision of the magistrate is final, though on the facts it may be legally erroneous: *Mayor of Westminster* v. *Gordon Hotels, Ltd.* (1). The effect of the expression "final and conclusive" in the statute of 1908 has been considered in *Sinnott's Case* (2), and in *Murphy* v. *Rex* (3), affirmed by the House of Lords (4). In the former case I stated at pp. 412–13 that the words were probably intended to exclude direct Treasury, Governmental, and judicial interference; and the opinion of

(1) [1908] A. C. 142.
(2) [1910] 2 I. R. 403.
(3) [1911] 2 I. R. 88.
(4) [1911] A. C. 401.

Cherry L.J. in the latter case (1) is emphatic to the same purpose. Lord Loreburn (2) considered that the question whether any condition is fulfilled or not may be raised repeatedly, on which view Rooney might renew his application, and the former adverse decision might be replaced by a decision in his favour if the Board accepted the view of the facts which I have indicated. The Board is not bound by its previous decision, though such decision is final and conclusive as regards external authorities. In *Sinnott's Case* (3) (at p. 413) I suggested that, without any new evidence proper, the pension authority might terminate a pension which had been allowed in mistake of law. A pensioner may have a reciprocal right in case of disallowance. Lord Loreburn's opinion points to continuing control.

Mr. Wylie referred to 1 & 2 Geo. 5, c. 16, sect. 5, as showing that the right had been lost by non-payment for three months. The delay was caused by refusal to pay, and the section does not apply.

A further point was made by applicant's counsel that the appeal decision was not confined to the period when the Pension Committee decided on the 1st October, but disabled the applicant up to the 3rd October. If the point was well founded, I do not think that the Court, in the exercise of its discretion, should allow the costly and dilatory process of certiorari to be applied. The decision of the committee was notified to the pensioner on the 6th October.

As to mandamus, if the decision was not quashed on certiorari, this Court cannot act as an appellate Court, and correct erroneous decisions: *Reg.* v. *Dayman* (4); *Reg.* v. *Middlesex Justices* (5); and the cases referred to in *Mahony's Case* (6). It is only where the inferior tribunal declines or fails to exercise jurisdiction that the Court can interfere.

In the present case the Board considered the merits of the appeal, and if in result they adopted a view which may not be the same as mine, they acted within jurisdiction, and their conclusion, good on its face, cannot, any more than an arbitrator's award, be set aside.

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(1) [1911] 2 I. R., at p. 106.

(2) [1911] A. C., at p. 404.

(3) [1910] 2 I. R. 403.

(4) 7 E. & B., at pp. 678, 679.

(5) 2 Q. B. D., at p. 520.

(6) [1910] 2 I. R., at p. 741.

The forms and procedure applicable to a lis before justices do not govern an administrative decision of fact of the present type. There are many cases as to this; but I do not refer to them in detail, as such point was not argued.

The substantial argument on both sides was addressed to the question whether the Board's construction of the expression "the annual value" was right in relation to the facts, and I have, therefore, thought it right to deal with it. The finality of the decision received in the argument little attention, and the authorities I have mentioned were not cited. If, as between the Pensions Committee and the Board on the one side, and the pensioner on the other, the determination was open to review, this might be a further objection to certiorari, which is confined to orders in their character final. In *Sinnott's Case* (1) the Court doubted whether a pensions decision, as an administrative act, was subject to certiorari. The order in *Pawley's Case* (2) was in excess of jurisdiction.

Kenny J.:—

The question in this case is whether the Local Government Board, as the central pension authority within sect. 7 of the Old Age Pensions Act, has exceeded its jurisdiction as the final appellate tribunal by its order of the 19th November, 1919. That section confers jurisdiction on the Local Government Board to determine any claim or question referred to them as the result of an appeal by the pensions officer or any person aggrieved, against a decision of the Local Pensions Committee, and it is declared that the decision of the Local Government Board "on any such claim or question shall be final and conclusive." The order of the 19th November, 1919, confirms the decision of the Local Pensions Committee, and, in my opinion, there was ample evidence in the case to enable either tribunal to arrive at a proper determination. The question for their decision was mainly one of fact, and unless we were of opinion that the Local Government Board have exceeded their jurisdiction we have no right to interfere with their order. I agree that if excess of jurisdiction were established

(1) [1910] 2 I. R. 403.

(2) [1910] 2 I. R. 440.

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this Court would not be precluded from considering the question of the finality, for all purposes, of the order. It seems to me that the Local Government Board, having jurisdiction under the statute to enter on this appeal, and to investigate all the circumstances affecting the pensioner's claim, have not been guilty of any excess of jurisdiction in arriving at the conclusion embodied in their order.

H. J. M'C.

June 9.

The prosecutor appealed. The Court of Appeal (1), without calling on counsel for the respondents, affirmed the decision of the King's Bench Division.

Solicitor for the prosecutor: *Edmund J. Duggan.*
Solicitor for the Local Government Board: *James Mecredy.*

R. ST. J. C.

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(1) Before Sir James Campbell C., and Ronan and O'Connor L.JJ.

K. B. Div.
1920.
May 11, 12.

RICHARD POWER *v.* PATRICK McENERY.

Practice—Costs—Disallowance by Taxing Master—Two counsel—Case for proofs—Consultation.

In actions in the King's Bench Division, where a sum exceeding £50 is claimed, the Taxing Master, in exercising his discretion in taxing the defendant's costs, should act on the presumption that it was proper to retain two counsel, and should not disallow them save for what appears to him to be reasonable cause.

The rules contemplate that where an action is to be tried upon oral evidence a case to advise proofs will be submitted to counsel. The Taxing Master has no discretion to disallow the costs incidental thereto.

The decision of the Taxing Master, disallowing a fee for consultation which had been certified for by senior counsel, was overruled, and the item allowed.

MOTION TO REVIEW TAXATION.

The plaintiff, Richard Power, a turf commission agent, of Belvedere, Tramore, County Waterford, brought an action against the defendant, Patrick McEnery, of Ballyvista, Emly, County Limerick, for £115, due by the defendant to the plaintiff for work done and moneys paid by the plaintiff for the defendant as commission agent; and in the statement of claim it was alleged that the defendant agreed and promised to pay the plaintiff the said sum in consideration of the plaintiff not posting, registering, or reporting the defendant to his detriment. The defendant in his defence denied the said debt, agreement, and promise, and pleaded the Gaming Act.

The action was, by consent, tried by Dodd J. without a jury, who gave judgment for the defendant, with costs, upon the pleadings only, without calling upon counsel for the defendant.

Upon the taxation of the defendant's costs, the Taxing Master disallowed all the costs of a second counsel, the case for proof, and a consultation. The defendant lodged objections to the taxation, but they were overruled by the Taxing Master, who in his report stated: "The case was not opened, there were no witnesses called, and the learned Judge gave judgment for the defendant, with costs. The pleadings disclosed that the action was in respect of betting transactions. . . . I have allowed the defendant in his bill of costs such charges as I considered he is entitled to, having regard to the nature of the action and the defence. After careful consideration, and having regard to all the circumstances, I arrived at the conclusion that the charges in connexion with these items were not necessarily incurred, and, acting in the best exercise of my discretion, I overruled the objection."

Comyn K.C. (with him *Phelps*), for the defendant:—

The Taxing Master's discretion is limited by Order 65 of the Rules of the Supreme Court, 1905, none of the rules of which expressly authorizes him to disallow the items which he has disallowed. The alleged promise to pay raised nice questions of law which make the conduct of the defendant's case sufficiently difficult to entitle him to be represented by a senior counsel. [*Wilson* v. *Connolly* (1) ; *O'Donnell* v. *Sullivan* (2) ; *Chapman* v. *Franklin* (3) ; *Hyams* v. *Stuart-King* (4) ; *Hyams* v. *Combes* (5) ; *O'Meara* v. *Barry* (6) ; *Henderson* v. *M'Tear* (7).] The Taxing Master is not entitled to take the merits of the case into account, as he has apparently done.

Power, for the plaintiff:—

The Taxing Master is entitled under Order 65, rule 37, to consider all the circumstances of the case, and in particular its complexity, as disclosed by the pleadings. It was apparent from the statement of claim and defence that the action was a simple one in respect of betting transactions, to which the Gaming Act was pleaded. It has been settled by authority that where a Taxing Master has a discretion the Court will not lightly interfere with his ruling.

Comyn K.C., in reply.

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(1) 27 T. L. R. 212.
(2) 47 I. L. T. R. 253.
(3) 21 T. L. R. 515.
(4) [1908] 2 K. B. 696.
(5) 28 T. L. R. 413.
(6) [1895] 2 I. R. 454.
(7) [1906] 2 I. R. 526.

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DODD J.:—

This comes before us on an application by the defendant for an order that the taxation by the Taxing Master of the defendant's costs of the action may be reviewed.

The Taxing Master has disallowed all items connected with the brief for senior counsel, all items connected with a case for advice of proofs, and all items connected with a consultation directed by senior counsel. We can quite appreciate and approve of the attitude of the Taxing Master in a case where the defence in fact was a defence of the Gaming Act, and, so far as the matters in controversy are within his discretion, we should not think of interfering with it. But we are bound by authority and principle, and must act in accordance with them. It was the right of the defendant, against whom a writ for £115 had been issued out of this Court, to appoint solicitor and counsel to conduct his defence, and to do all things reasonably necessary as advised by them.

Upon the first question Mr. Comyn contends that the Master has no discretion to disallow a second counsel. He says there is no case of a second counsel being disallowed. I take it he confines his argument upon this to actions in the King's Bench Division, tried by a jury, with oral witnesses. For in Chancery, even in a plenary suit, the Court may disallow a second counsel, and the Taxing Master may, in his discretion, disallow a second counsel. Mr. Justice Cozens-Hardy, as he then was, in his judgment in *In re Maddock Butt* v. *Wright* (1), decided that it was competent to overrule the decision of the Taxing Master on such a matter. This is, he says, quite clear on the authorities to which he refers. Quoting from the Registrar's report in *Butt* v. *Wright* (1), Mr. Justice Cozens-Hardy said: "The two counsel, therefore, appeared for Mr. Wright alone, and, inasmuch as he is only one of the trustees not beneficially interested, I do not, in the exercise of my discretion, consider he was justified in putting the estate to the cost of two counsel. The arguments in Court, so far as the trustees were concerned, referred mostly to their own costs and the conduct of the sales, which was given by the Judge to the plaintiff." And the learned Judge then proceeds: "That it is competent to the Court to overrule the decision of the Taxing Master in such a matter as this is clear. I may refer to *Kirkwood* v. *Webster* (1), where Fry J., on a party and party taxation, allowed the costs of a third counsel, which had been disallowed by the Taxing Master. But I have felt considerable doubt whether it is right for me to review the taxation in this respect, for I recognize fully that the discretion of an experienced Taxing Master ought not to be lightly interfered with. There are, however, circumstances in this case which, I think, justify me in referring it back to the Registrar to allow the proper costs of a second counsel. Where a trustee is attacked and sought to be rendered liable for a considerable sum of money, and when the attack fails, and the Judge directs taxation of his solicitor and client costs, I think it is not reasonable to refuse to allow him the same assistance from counsel as the plaintiff, the attacking party. The Registrar seems to me to have proceeded on a wrong principle, and to have been influenced by the fact that Byrne J. thought fit to allow a separate set of costs of the hearing on further consideration to each of the defendants; but I do not think this circumstance makes any difference. The right given to the defendant Hull to appear by separate counsel ought not to prejudice the defendant Wright. The position of a trustee is at all times one of difficulty. I am not disposed to say that Mr. Wright acted unreasonably or improperly in instructing two counsel to represent him."

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(1) [1899] 2 Ch. 588, at p. 591.

An action in the King's Bench Division, however, runs on quite different lines. There are but two parties. Though pleadings need not now be signed by counsel, a junior counsel still must be employed for the plaintiff to open the pleadings. A King's Counsel may hold a brief for the defendant without a junior, but the long-standing usage of the profession is in favour of two counsel in a case of any importance. Mr. Comyn says there is no reported case of the Taxing Master having disallowed two counsel. The fees, too, in Ireland, as stated in the case cited, are fixed on that basis. One counsel may not be free when a jury is empanelled, and the jury may not be detained. On principle, therefore, Mr. Comyn says he is entitled to have two counsel. He says the uniform practice of the Taxing Master is to allow two as of right. Mr. J. C. Davison, who is an accurate and careful lawyer, and who never errs in a matter requiring research, puts it differently in argument in the case of *In re Arbitration between Small and the Scottish Live Stock Insurance Company* (1). That case is not without value in our inquiry. It was the case of an arbitration held in Belfast during the Summer Assizes, but commenced at the rising of the Assize Courts, and was finished on the same day in a few hours. Seven witnesses were examined, three of whom were experts. The umpire awarded the full sum claimed, £100 and costs, less a small sum for salvage, and this award and the submission were subsequently made a rule of Court. W. Small was represented at the hearing by two counsel, a senior and junior. The Taxing Master on taxation reduced the fees paid from £7 7*s.* and £5 5*s.* to £5 5*s.* and £3 3*s.*, but on objection to this decision the Taxing Master restored the fee of £7 7*s.* to senior counsel, and disallowed altogether the costs of a junior counsel. In his report he said: "After careful consideration of the facts of the case, I have come to the conclusion that this is a case in which I should allow only one counsel. The case was a small one, and the arbitration was held after the ordinary legal day's work was done, so that counsel who represented the plaintiff was available the whole time, and would devote his individual attention to the case. In the circumstances, exercising my discretion to the best of my ability and judgment, I have decided to allow one counsel only a fee of £7 7*s.*" The motion to review in that case was argued before the King's Bench Division by Mr. Davison, and he says in his argument: "The case was important. The arbitration was not a mere assessment of damages. Liability was disputed on two grounds, and a substantial amount has been recovered. If the same sum had been recovered in an action in the High Court, two counsel would have been allowed. I can find no Irish case in which a second counsel was disallowed, except cases within the County Court jurisdiction." The members of the Divisional Court in that case were of opinion that the magnitude of the case justified the allowance of two counsel as in a High Court action for the same sum, but this decision was reversed by the Court of Appeal. FitzGibbon L.J. (at p. 608) says: "The Taxing Officer had to ascertain the proper costs to be allowed, not of a proceeding in the High Court, but of an arbitration; and, there being no particular rule applicable to the matter, we cannot better define the duty of the Taxing Officer than by applying to it the rules which govern the cases which come within them. Wherever the rules authorize the Taxing Officer to go beyond the schedule amount, they limit his discretion by the words, 'having regard to the nature and importance of the case.' It must follow that he had power to decide that one counsel was enough in the present case, having regard to its nature and importance, and he has exercised his judicial discretion upon judicial grounds in so deciding. No question of principle is involved; and in my opinion neither the Court of Appeal nor the High Court is justified in substituting its discretion for his by saying that he has allowed too much or too little." Holmes L.J. concurred.

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(1) 9 Ch. D. 239.

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(1) [1908] 2 I. R., at p. 606.

The learned Lord Justice seems to recognize the practice of the profession in actions in the High Court, and, at any rate, not to dissent from Mr. Justice Kenny's judgment.

In this state of the authorities, and the alleged practice in the Taxing Master's office, this is a clear authority that, whether the Taxing Master has a discretion or not, his ruling may be reviewed by us. I am, for myself, unwilling to lay down any hard and fast rule, and I do not think I am bound to say that the Taxing Master must allow two counsel in every case. I think I may go so far as to say that in an action in which a sum over £50 is claimed, the Taxing Master, in exercising his discretion in taxing the defendant's costs, should act on the presumption that two counsel are proper, and should not disallow them save for what appeared to him reasonable cause. Is there reasonable cause here? The defendant seeks the protection of the law; the plaintiff seeks to evade the Gambling Act, to get a verdict or judgment notwithstanding its provisions. The special circumstance here is that the defendant is availing himself of a statute that an honourable man would not have resort to. But we cannot recognize it as a fault that a defendant appeals to the law. Again, cases are numerous where efforts have been made, sometimes unsuccessfully, sometimes successfully, to get a consideration for a fresh promise. A solicitor cannot appear himself. He must have counsel. Can I say it is unreasonable in him to have senior counsel? Questions may arise of some nicety; questions of costs may be sprung upon him. In the simple matter of whether he should consent to dispense with a jury or not his advice may be needed. With a jury costs follow the event. Without a jury they are in the discretion of the Judge. Upon the human side, too, the plaintiff is not entitled to as much consideration as he claims. He brings an action, knowing he has no case, in the hope that counsel, under the colour of stating a mercantile case, will hold the defendant up to reproach as a man who will not regard the obligations of honour. Counsel for the defendant will be within his right in seeking to prevent the Court from being made a platform for abuse. The Court will not unless called upon unduly interfere with counsel in stating a case. Counsel for the defendant of experience will be able to keep the case upon lines of legal right. The plaintiff must pay for the privilege of letting the public know that, though the plaintiff has no case in law, the defendant has no defence in honour. We think we are coerced by principle and authority to allow two counsel.

The next point is: had the Taxing Master discretion to disallow items for the advice of proofs? We are concluded by authority. *Starkie* v. *Whiteside* (1) decides that he has no such discretion. The rule there was identical with the rule now in force. In that case it was laid down that in every action which is to be tried upon oral evidence the rules contemplate that a case will be submitted to counsel to advise proofs, and that Orders 10 and 12 gave the Taxing Master no discretion to disallow the costs incidental thereto. In the case of *Fry* v. *James* (2) the Vice-Chancellor says:—"I am sure that every other Judge of this Court is as fully convinced as I am that a proper direction of proofs is one of the most important matters in the conduct of a suit, and that no cause should be brought into Court without having the proofs properly directed by counsel on a case laid before him for that purpose." And this is now the

(1) 26 I. L. T. R. 534 (Misc.). (2) I. R. 5 Eq. 255, at p. 256.

settled practice. The practice of the Court on the Common Law side and on the Chancery side is thus fully established. A suitor is entitled to be advised; and a solicitor might incur serious responsibility if he did not protect himself and his client by such advice. The Taxing Master is entitled to inquire into the expenditure connected therewith, and to allow only such expenditure as he thinks is just and reasonable, but he has no jurisdiction to disallow all expenditure.

The third question is one of more difficulty: as to whether the Taxing Master is bound to allow the costs of consultation fees when senior counsel certifies that a consultation is necessary. The decision of the Chief Baron in *White* v. *Whelan*, reported in a foot-note to *Hodson* v. *Armstrong* (1), and the decision of the Court in *Hodson* v. *Armstrong* (1) itself, following that decision, almost go the length of saying that the certificate of counsel is given upon honour. In *Hodson* v. *Armstrong* (1) Mr. Justice Andrews says:—"As to the disallowance of the consultation, senior counsel gave a certificate that a consultation was required. Serjeant Hemphill, as amicus curiae, has very kindly come in here and explained to the Court the grave reasons why he gave the certificate. Such certificate of counsel is always in every Court considered as worthy of the very greatest consideration, and should be disregarded very rarely indeed. In our opinion, in that matter the Taxing Officer erred in principle in disregarding the certificate of senior counsel."

We must therefore send this back to the Taxing Master to review the items upon these principles; and inside these principles to disallow any item that is not, in his opinion, just and reasonable.

Samuels J.:—

I am of the same opinion, but without expressing any view as to the possible disallowance of a second counsel in proceedings in the Chancery Division. This is an action in the King's Bench Division not within the jurisdiction of the County Court. Each of the objections in this case involves a question of principle.

(1) 26 I. L. T. R. 23.

These principles have been established by authorities with which my brother Dodd has fully dealt. The discretion of the Taxing Master is a judicial one, and has to be exercised in conformity with these settled principles. The matter must be referred back to him.

Solicitors for the plaintiff: *D. Dunford & Co.*
Solicitor for the defendant: *John J. Power.*

H. H.

THOMPSON & SON, Ltd., v. THE KING (1).

K. B. Div.
1919.
Dec. 2, 3.
1920.
Jan. 13.
Feb. 11, 12.
25.

Vendor and purchaser—Contract—Agreement between parties "subject to contract."

Where an offer and acceptance are made (*a*) subject to a subsequent formal contract, if such contract is a condition or term which until performed keeps the agreement in suspense, the offer and acceptance have no contractual force. On the other hand, if all the terms are agreed on, and (*b*) a formal contract is only contemplated as putting the terms in legal shape, the agreement is effectual before and irrespective of such formal contract.

Held, reversing the judgment of Pim J., that on the facts, and in the circumstances set forth in the present case, the agreement between the parties came within (*a*), and therefore was not enforceable. The judgment entered for the suppliants was reversed, and the petition dismissed with costs accordingly.

Per Gibson J.: Where it is desired to have a Petition of Right tried without a jury, an order of the Court for that purpose should be obtained beforehand, so as not to allow the case to proceed to trial with a jury, which could only be discharged by consent.

Petition of Right.

The correspondence and facts are fully set out in the judgment of Pim J. The petition was originally set down for trial before him and a special jury, but with the consent of counsel on both sides the jury was discharged, as it was agreed that the question was one of the application of legal principles to the facts, which were not in dispute.

Healy K.C., *E. S. Murphy K.C.* (with them *Fforde*), for the suppliants.

Wylie K.C., *Babington K.C.* (with them *Holmes*), for the Crown.

Cur. adv. vult.

Pim J.:—

1920.
Jan. 13.

This is a case of a Petition of Right, presented by Messrs. Thomas Thompson & Son, Ltd., of Carlow, Engineers, in which the suppliants set out that a contract which had been entered into between His Majesty's Minister of Munitions and the suppliants, agreeing to sell to them, in consideration of £24,200, the Munition Factory at Waterford and the stores therein, had been broken by the refusal of the Minister to carry out his contract. The suppliants claimed £4000 damages for breach of this contract.

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(1) Before Molony C.J., and Gibson and Gordon JJ.

During the course of the war, the Minister of Munitions, acting under the powers given to him by the Defence of the Realm Act, took from the Great Southern and Western Railway Co. a piece of ground in the City of Waterford, and erected thereon a National Cartridge Factory. Soon after the signing of the armistice in the month of November, 1918, the Minister signified his intention of selling the factory and the stores therein; and as early as the 30th of November in that year the suppliants wrote to Mr. Frank Lyall, the agent of the Minister of Munitions, saying, "I am prepared to make you a bid for it as it stands, lock, stock, and barrel." In reply to this letter, Mr. Lyall directed the suppliants to make any bid that they wished to make to the Directors in Dublin.

On the 24th February, 1919, the suppliants wrote to the Directors of the Ministry of Munitions in Dublin that they would "take over the premises, machinery, plant, tools, and full equipment, as they stood on the 1st inst., and all as described by the maps, drawings, and complete inventory and schedule made shortly before that date, and to pay you the sum of £20,000 (twenty thousand pounds) in cash," but said that the offer was subject to a condition that a reasonable rent and term could be arranged with the owners of the site (that is, the Great Southern and Western Railway Co.). The suppliants added that they intended to start an industry on the site, and that it was a matter of great importance to them that they should obtain as long a lease as possible, at a reasonable rent; they further wrote that, as their offer had been based on the assumption that the term and rent forecasted by the Minister would apply, they would be prepared to reconsider their offer if they got more favourable terms.

On the 11th of March, 1919, the suppliants wrote to Mr. Lyall a letter in which they again stated that if the Minister were in a position to come forward and offer a reasonable term under a lease, or to sell the freehold with the ground, they would be in a position to make a better offer; and also that if the machinery and buildings only were offered for sale, and twelve months given for breaking them up, the machinery would probably bring a better price.

In reply to this letter, Mr. Lyall wrote on the 13th of March that Sir Howard Frank, the then principal agent of the Minister of Munitions, had not the value of the factory clear in his own mind, and that he would not be in a position to inform the suppliants what was the lowest figure which he would accept for some days.

On the 26th April, 1919, Sir Howard Frank wrote the following letter to the suppliants:—"4 Whitehall Court, 26th April, 1919.—National Cartridge Factory, Waterford. Dear Sirs,—Three offers have been made for the above factory complete, neither of which are acceptable. It has, however, been decided, in order to afford those who have made these offers a further opportunity of considering the matter, to ask each to submit their best proposal exceeding £20,000, on or before twelve o'clock, on the 5th May next, when the highest offer above £20,000 will be accepted, subject to its being in a form which is satisfactory, and to a formal contract to be approved by the Chief Crown Solicitor. No assurance whatever can be given that the land can or will be acquired, but you are aware of the terms upon which it is held. A similar letter is being sent to the other two who offered for the factory.—Yours faithfully, Howard Frank.—Messrs. Thompson & Sons, Ltd., Carlow, Ireland."

The statement in the letter that no assurance could be given that the land could or would be acquired, and that the suppliants were aware of the terms under which it was held, is a clear indication to the suppliants that the Minister intended to sell what he had, and nothing more or less, and that he did not intend to encumber himself with attempting to get better terms for the suppliants from the railway company.

Another letter, which is undated, but which seems to have been written about the same time, is as follows:—"4 Whitehall Court, London, S.W., 1.—Waterford.—Dear Sirs,—I am in receipt of your letter of the 5th, but you will remember your previous offer was subject to a reasonable rent and term being arranged with the owners of the site. I cannot entertain any offer with such a condition. Will you therefore let me know if you waive it, and that you will make your own arrangements with the railway company?—Yours faithfully, Howard Frank.—Messrs. Thompson & Son, Ltd., Hanover Works, Carlow."

This letter is again an intimation to the suppliants that the Minister of Munitions would not enter into any negotiations with the railway company as to the lease or the rent to be reserved thereunder, and that all such matters must be looked to by the suppliants; and it is clear from the further correspondence that the suppliants so understood the letter.

On the 8th May, 1919, the suppliants telegraphed to Sir Howard Frank as follows:—"Just as soon as you can give me a definite yes or no I am prepared to make revised offer definite also." It is not clear, and it has never been clear to me, what this definite "yes or no" referred to, but I take it to refer to the difference which had arisen between the Minister and the suppliants as to the value of the stores on the Waterford site, and as to whether they would or would not be comprised in whatever offer the suppliants made.

In reply to that telegram, a letter dated the 8th May, 1919, was sent by Sir Howard Frank to the suppliants. He repeated the telegram, and proceeded:—"If you had made an offer without a condition which was obviously impossible, it would have been accepted subject to contract, but you did not do so, and in the meantime I have agreed to allow the matter to remain open until next Monday morning. If you desire to purchase, you must please put forward your proposal in a way that can be entertained."

This letter went no further than the last letter written by Sir Howard Frank; but it is a third intimation to the suppliants that the Minister would have nothing to say to any negotiations with the railway company.

On the 22nd May, 1919, the suppliants wrote again to Sir Howard Frank. They reminded him that they had already offered £21,500, and that he had been then willing to include some of the stores in the price named. They pointed out to him that the arrangement was that the Minister was to make an offer, and they continued:—"If, therefore, you will kindly let me have an offer, I will, if it is reasonably near my estimate, close the matter at once."

In reply to this last letter Sir Howard Frank sent the following telegram to the suppliants:—"Thompson, Hanover Works, Carlow.—Will accept subject contract twenty-four thousand two hundred pounds (£24,200) for Waterford Factory as we hold it, including stores, but excluding Board of Works property and certain press spares of Gramophone Company, which is not factory property, as pointed out by Major Devine, subject your acceptance and confirmation by noon Tuesday, 27th instant.—Howard Frank. 24th May, 1919."

This telegram was confirmed in a letter of the same date.

On the 27th May, 1919, the suppliants telegraphed to Sir Howard Frank as follows:—"To Sir Howard Frank, 4 Whitehall Court, London.—We accept your offer of the W. N. C. F. at £24,200, conditions as to B. O. W. and Gramophone property being as represented. Kindly forward draft contract to Carlow, with definite information as to holding agreement from railway, and ask your local representatives to give us facilities to compare stores, so that possession may be obtained this month. If wire reply necessary address c/o Certify, Dublin, to-day.—Thomas Thompson & Son, Ltd., Carlow."

On the same day Sir Howard Frank telegraphed to the suppliants as follows:—"Telegram received. Instructions given prepare necessary contract Waterford. Advised by wire; letter follows."

And again, on the same day, Sir Howard Frank wrote to the suppliants, setting out the wire received from them, and confirming telegram, and continued as follows:—"The contract is being prepared, and will be sent to you during the next few days. The land is at present held temporarily under the Emergency powers of the Crown; but, as you are aware, the G. S. & W. Ry. Co. has expressed willingness to consider grant of a lease for ten years, with a possible extension for a further ten years if the land is not then required for railway purposes. This is, however, a matter of negotiation between yourselves and the railway company. A telegram has been sent to the Factory Management as follows: 'Waterford Factory sold to Thompson, including stores, subject contract. No further removal or disposal of stores should be made. Board of Works property and Gramophone spares for presses excluded from sale.' Instructions will be given to enable you to immediately take stock of the stores at present in the factory, and to prepare an agreed list, which can be checked on your taking over on completion; but, of course, it must be clearly understood that possession cannot be given you until the contract has been signed, and the purchase duly completed."

Now, before I go any further in my narration, I desire to state that the telegrams of the 24th and 27th of May, but for the disputed words "subject contract," form as clear a contract as could be imagined, and that, if those two words were not in the offer made by Sir Howard Frank, no Court of law could refuse to say it was a concluded contract, and that it must be carried out. The exact significance of these two words, "subject contract," is a matter about which I shall have to say a good deal later on, but for the present I will go on with the narrative.

The suppliants, apparently about the time they had received this last letter from the Minister, had applied to the railway company to know what terms the company would make with them. The company's answer is a somewhat melancholy document. The terms they sought to impose were of the most onerous kind, and I can only suppose they did not desire that any industry should be started by the suppliants in Waterford.

Shortly after the last letter from Sir Howard Frank, the suppliants wrote to Major Devine, Secretary of Sir Howard Frank, telling him of the terms which the railway company had sought to impose, and saying that it would be impossible to carry on an industry on such terms, and asking the Minister to do what was possible to prevail on the railway company to let them have better terms. The suppliants admitted, however, that if the Minister did anything for them it would be a matter of grace, for they said: "While your offer clearly indicated that you were not taking responsibility for tenure of the premises, we take it that you are in a position to arrange with the railway company to give us a letting agreement free from such restrictive clauses as they suggest." In reply Major Devine, for Sir Howard Frank, wrote the following letter:—

"Charing Cross Buildings, Embankment, London, W.C. 2,
"14th June, 1919.

"Waterford National Cartridge Factory.

"Dear Sirs,—With reference to your letter of the 31st May, 1919, I have been expecting to hear from you the result of the further interview with the railway company, which you were to have had last week. The Minister is not prepared to give any undertaking to acquire the land, and it therefore rests with you to make the best terms you can with the railway company.

"The matter must be definitely settled without delay, and I have therefore to ask you to let me know by the 27th inst. at latest whether you are prepared to purchase the buildings, machinery, stores, etc., on the terms of the draft agreement forwarded herewith.

"Please let me know as soon as you have made your arrangements with the railway company.—Yours faithfully, ——, for Sir Howard Frank.

"Messrs. Thomas Thompson & Son, Ltd., Hanover Works, Carlow."

In reply to that letter the suppliants wrote on the 18th June to Major Devine, saying that the project of starting a factory on the premises would become quite impossible if the railway company's terms were to be acceded to, and asking the Minister whether it would not be possible for him to demand an open and unconditional lease from them. The letter ended by stating that the draft agreement which had been submitted had been sent on to their solicitors. These two letters from the suppliants have been relied on by counsel for the Crown as proof that the suppliants still regarded the negotiations as continuing. I did not so read them. I think they were merely an appeal to the Minister to come to their help in a difficult situation, in which they found their efforts to found an industry thwarted and impeded.

On the same day the suppliants' solicitors returned the draft agreement to the Minister of Munitions amended by them.

The draft agreement when sent to the suppliants contained nothing which had not already been in the telegram of the

24th May, 1919. It merely put the terms into legal form. Nothing had been added to them, nothing subtracted from them, and, I may add, nothing could have been added to them, and nothing could have been subtracted from them, because the course of the correspondence establishes plainly that the only matter of negotiation between the Minister and the suppliants was the question of the price to be paid and the matters to be handed over for said price. The suppliants were well aware of this, as their first letter to Major Devine shows, and what madness seized them in attempting to introduce other matters into the formal agreement I cannot imagine. It was in all probability a mere "try on." Its foolishness consists in the fact that success was unimaginable. However that may be, on the 1st July, 1919, Mr. Alexander W. Lawrence, solicitor for the Treasury, wrote to the solicitors for the suppliants the following letter:—

"Treasury, S.W. 1, 1st July, 1919. *Re* Waterford National Cartridge Factory.

"Dear Sirs,—The Directorate of Lands has handed me your letter of the 19th June (addressed to Major Devine), together with the draft agreement submitted by the Directorate to your clients, Messrs. Thomas Thompson & Sons, Ltd., and revised in red ink by you on behalf of the company.

"I am instructed by the Directorate to say that the proposed revisions are wholly unacceptable; and I am to add that, having regard to the difficulties which have been raised by Messrs. Thomas Thompson & Son, Ltd., and by the Great Western Railway Company of Ireland, in reference to this matter, the Directorate has decided not to proceed any further with the negotiations for sale to your clients.—Yours faithfully, Alexander W. Lawrence.

"Messrs. Henry & Son, Solicitors, 11 Molesworth Street, Dublin."

It is first to be noted that the Ministry of Munitions had waited from 18th June, 1919, to the 1st July, 1919, before replying to Messrs. Henry & Son in regard to the amendments in the draft agreement. They had thus carried the matter over the 27th June, which was the date fixed by the letter of the 14th June, 1919, from Major Devine for an answer to be given by the suppliants to that letter.

The suppliants' solicitors write a letter containing the following statement:—"If you consider the draft agreement as furnished entitled our clients to get delivery of the property purchased, they are satisfied to sign it, and pay over the purchase price forthwith."

In reply to that letter Mr. Lawrence wrote:—"I am instructed that it is regretted that it is not possible, in view of the difficulties which have arisen, to proceed further with the negotiations for sale to your clients."

On the 7th July, 1919, suppliants' solicitors wrote saying that it was not competent for the Directorate of Lands "to cancel the contract entered into with their clients in view of difficulties which have arisen, and which are not of our clients' making"; and they added that their clients could not afford to be treated as the Directorate proposed, and that, unless the contract were carried out, they would take prompt proceedings to enforce it. And so the story ended.

Now, as I said before, the contract contained in the two telegrams, save for the words "subject contract," is as clear a contract as could be imagined, and the difficulty in the case arises from the introduction of those two words. What I have to decide is: what do they mean? An immense number of cases have been cited to me, all of which I have read, but very few of which I intend to deal with. The gist of all the cases is that the Court should in each case, having considered the wording of the documents containing the alleged contract, the correspondence before and after, and the nature of the transactions, say whether in fact the parties meant that the matter in negotiation should remain in a state of negotiation until a formal contract was signed, or whether they only meant that the contract which had been entered into should be embodied afterwards in a formal contract. It is in every case an issue of fact for the Court. The matter could not be put more succinctly than it was put by Lord Westbury in *Chinnock* v. *the Marchioness of Ely* (1), namely: "I entirely accept the doctrine contended for by the plaintiff's counsel, and for which they cited the cases of *Fowle* v. *Freeman* (2), *Kennedy* v. *Lee* (3), and *Thomas* v. *Dering* (4), which establish that if there had been a final agreement and the terms of it are evidenced in a manner to satisfy the Statute of Frauds, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties. As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged, or his agent lawfully authorized, there exist all the matters which this Court requires to make a legal binding contract. But if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation." In commenting on these words in the case of *Rossiter* v. *Miller* (1), Lord Cairns said: "I entirely acquiesce in what he [Lord Westbury] says, that if you find, not an unqualified acceptance of a contract, but an acceptance subject to the condition that an agreement is to be prepared and agreed upon between the parties, and until that condition is fulfilled no contract is to arise, then undoubtedly you cannot upon a correspondence of that kind find a concluded contract."

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(1) De G. J. & S., at p. 645.

(2) 9 Vesey, 351.

(3) 3 Mer. 441.

(4) 1 Keen, 729.

From these words it is clear that I must find that those words "subject contract" import not only that there should be a formal contract, but that, until that formal contract was entered into, no contract was to arise. No case has been cited to me in the least like the present case. Every case was decided one way or the other on its special facts, and in cases of this kind no authority can be of much assistance in the interpretation of a different state of facts. In many of the cases, of which *Winn* v. *Bull* (2) and *Crossley* v. *Maycock* (3) are examples, the alleged contract was for the sale of land, or the granting of a lease. In all such cases it is manifest that many details of negotiation must be left unsettled, and no one can doubt that in that class of case the Court would be right in finding that it was intended that the negotiations should go on until all the details had been cleared up and put into written legal form. Almost all the cases cited to

(1) L. R. 3 A. C., at p. 1139.
(2) L. R. 7 Ch. D. 29.
(3) L. R. 18 Eq. 180.

me on behalf of the Crown are of this kind, and they do not give me much assistance in deciding this case.

Now, as Lord Blackburn said in the case of *Rossiter* v. *Miller* (1): "Parties often do enter into a negotiation meaning that when they have (or think they have) come to one mind, the result shall be put into formal shape, and then (if on seeing the result in that shape they find they are agreed) signed and made binding; but that each party is to reserve to himself the right to retire from the contract, if, on looking at the formal contract, he finds that, though it may represent what he said, it does not represent what he meant to say." Granting that that is so, is there the slightest evidence in this case that the Ministry of Munitions were anxious to see the matter which they had agreed to, in writing, before they bound themselves? I think not. Again I must quote Lord Blackburn: "So long as they are only in negotiation, either party may retract, and though the parties may have agreed on all the cardinal points of the intended contract, yet if some particulars essential to the agreement still remain to be settled afterwards, there is no contract." And again:—"But as soon as the fact is established of the final mutual assent of the parties, so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is completed." And again:—"Nothing new could be introduced into it, and the purchaser, if he signed such a contract as is stipulated for there, would not have agreed to anything more than he had already agreed to." Applying these last three quotations to this case, I have already called attention to the fact, which is clear to demonstration, that every detail about which any negotiation could take place between the suppliants and the Minister of Munitions was embodied in the telegrams, and that when the solicitor for the Treasury settled the formal agreement there was not to be found in it one word more than was to be found in the contract in the telegrams. I will not suppose that the Minister of Munitions was anxious to see that no bad grammar was used in the formal contract. What else would he want to see it for? If it contained the contract in the telegrams, he could insist on it remaining without amendment. He was entitled to say: "Those are the terms I have agreed to; I will not allow any amendment to the terms themselves," and the suppliants would have had to give way. I cannot, therefore, think that any such idea remained in the mind of the Minister that he desired to see the contract in written legal form before he finally concluded the negotiations; and, without some such explanation, how can it be contended that it was the intention of the Minister that "no contract was to arise until a formal contract was entered into"? What, then, was the meaning of the words "subject contract" or "subject to contract," which are to be found in several of the documents? In my opinion their meaning is given in the letter from Sir Howard Frank, written immediately after he had received the acceptance by the suppliants of his offer. His words are:—"Instructions will be given to enable you immediately to take stock of the stores at present in the factory, and to prepare an agreed list which can be checked on your taking over on completion, but of course it must be clearly understood that possession cannot be given to you until the contract has been signed and the purchase duly completed."

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(1) L. R. 3 A. C., at p. 1152.

The Minister had already written to his agents in Waterford that the factory had been sold to the suppliants, and had so informed the suppliants. Sir Howard Frank evidently anticipated that the suppliants might attempt to exercise rights of ownership over the works before everything was in order and the money paid. The object, in my opinion, of this condition was to meet this very fear, and to make it clear to the suppliants that, until they had bound themselves by a formal written agreement, they would have no right to interfere in any way with the factory or with the stores therein. I am satisfied that the words "subject contract" never meant that the negotiations were to go on until the formal contract had been signed; nor, beyond the use of the words, is there the slightest evidence that Sir Howard Frank so understood them. I am inclined to think that the statement to that effect in the solicitor's letter was a mere after-thought.

Having come to this conclusion, I must declare suppliants entitled to succeed, and that judgment should be entered for them for £4,000 and costs.

H. J. M'C.

K. B. Div.
1920.

Thompson
v.
The King.

Feb. 11, 12, 25.

The Crown applied to the King's Bench Division (1) to have the judgment of Pim J. set aside, and the petition dismissed.

Wylie K.C., *Babington K.C.* (with them *Holmes*), for the Crown.

Healy K.C., *E. S. Murphy K.C.* (with them *Fforde*), for the suppliants.

[Authorities cited and discussed :—*Chinnock* v. *The Marchioness of Ely* (2); *Fowle* v. *Freeman* (3); *Rossiter* v. *Miller* (4); *Wynne* v. *Bull* (5); *Crossley* v. *Maycock* (6); *Brien* v. *Swainson* (7); *May* v. *Thompson* (8); *Harvey's Case* (9); *Hawkesworth's Case* (10); *Lloyd* v. *Nowell* (11); *Von Hatzfeldt-Wildenburg* v. *Alexander* (12); *Bonnewell* v. *Jenkins* (13); *Gray* v. *Smith* (14); *North* v. *Percival* (15); *Santa Fe Land Co., Ltd.*, v. *The Forestal Land, Timber, and Railways Co., Ltd.* (16); *Ridgway* v. *Wharton* (17); *Hussey* v. *Horne-Payne* (18); *Bellamy* v. *Debenham* (19); *Perry* v. *Suffield's, Ltd.* (20); *Magg's Case* (21); *Lewis* v. *Brass* (22); *Kennedy* v. *Lee* (23); *Thomas* v. *Deering* (24); *Bolton Partners* v. *Lambert* (25); *Jones* v. *Daniel* (26); *Gibbins* v. *The North-Eastern Metropolitan Asylum District* (27).]

Cur. adv. vult.

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(1) Before Molony C.J., and Gibson and Gordon JJ.

(2) 4 De G. J. & S. 638.

(3) 9 Vesey, 351.

(4) 5 Ch. D. 648; L. R. 3 A. C. 1124.

(5) L. R. 7 Ch. D. 29.

(6) L. R. 18 Eq. 180.

(7) 1 L. R. Ir. 135.

(8) 20 Ch. D. 705.

(9) 50 L. J. Ch. 750.

(10) 55 L. J. Ch. 335.

(11) [1895] 2 Ch. 744.

(12) [1912] 1 Ch. 284.

(13) 8 Ch. D. 70.

(14) 43 Ch. D. 208.

(15) [1898] 2 Ch. 128.

(16) 26 T. L. R. 534.

(17) 6 H. L. C. 268.

(18) 4 App. C. 311.

(19) 45 Ch. D. 481; [1891] 1 Ch. 413.

(20) [1916] 2 Ch. 187.

(21) 44 Ch. D. 616.

(22) 3 Q. B. D. 667.

(23) 3 Mer. 441.

(24) 1 Keen, 729.

(25) 41 Ch. D. 295.

(26) [1894] 2 Ch. 332.

(27) 11 Bev. 1.

MOLONY C.J.:—

This petition of right has been brought by the suppliants claiming that by virtue of certain letters, telegrams, and communications from 13th February, 1919, to 7th July, 1919, between the suppliants and His Majesty's Minister of Munitions, and more particularly by virtue of a telegram of offer received the 24th day of May, 1919, from the Minister of Munitions to the suppliants, and a telegram of acceptance despatched by the suppliants on the 27th day of May, 1919, to Sir Howard Frank, agent of the Minister of Munitions, it was mutually agreed between the suppliants and Sir Howard Frank, as agent for His Majesty's Minister of Munitions, that the suppliants, in consideration of £24,200 to be paid to the Minister of Munitions, should acquire the Munition Factory at Waterford, as then held by His Majesty's Minister of Munitions, including all stores, but excluding certain other property therein mentioned.

The Attorney-General put in an answer and plea, in which he claimed that there was no agreement made between the suppliants and Sir Howard Frank, as alleged, and that the only agreement (if any) was made subject to a condition that the offer made by the suppliants should be in a form which was satisfactory, and subject to a formal contract to be approved of by the Chief Crown Solicitor, and that no such contract had been approved.

The case was tried before Mr. Justice Pim, and he held that the contract was established, and gave a judgment for £4000 damages.

The correspondence alleged to constitute the contract opens with a letter of the 13th February, 1919, from Messrs. Henry & Son, the solicitors for the suppliants, to the Directors of the Ministry of Munitions, Dublin, stating that a client of theirs, who proposes offering for the plant at the Waterford National Cartridge Factory complete, was anxious to know how the premises were held, what lease would be given, and at what rent. There is no evidence of this letter having been answered; but on the 24th of February, 1919, the suppliants wrote to the Directors of the Ministry of Munitions, Dublin, offering to take over the premises, machinery, plant, tools, and full equipment as they stood on the 1st February, and to pay therefor the sum of £20,000 in cash, subject, however, to a condition that a reasonable rent and term could be arranged with the owners of the site, and subject to acceptance within ten days from that date. No reply was received to this letter until the 10th of March, 1919, when a telegram was sent from the Ministry of Munitions stating: "Will endeavour to secure decision this week. Present idea is that offers received are inadequate; if this is confirmed by valuation, auction probably be held."

On the following day the suppliants wrote, giving considerations in favour of their offer, which apparently did not find favour with the Ministry, because on the 26th April, 1919, Sir Howard Frank wrote as follows to the suppliants, under the heading, "National Cartridge Factory, Waterford" (see ante, p. 367).

The land had been acquired by the Ministry of Munitions under the powers conferred on them by the Defence of the Realm Act, and they had no right or title to the lands save the power to enter given them by the regulations.

The suppliants were anxious all through that before the matter was completed some tenure should be obtained from the railway company, who owned the site, and that this should be effected either by the suppliants themselves or by the Ministry under their supposed statutory powers. This matter is adverted to in subsequent correspondence, but it is perfectly clear that the Ministry always declined to negotiate with the railway company.

On the 22nd May, 1919, the suppliants wrote to Sir Howard Frank a letter stating what apparently they believed to be the effect of the interview with Sir Howard Frank, which they had had pursuant to arrangement fixed by telegram of 12th May, 1919. The letter states: "The agreement between us was that I was to purchase the W.N.C.F. complete—stores, plant, premises—and get possession of everything as it then stood for £21,500, subject to your provisional agreement for renting from the railway company. You, however, reserved the question of the consumable stores until you could send an agent to see them and report to you, when you undertook either to confirm the deal at the price or offer it to me at a higher figure if you thought such was necessary on the report. You certainly included consumable stores to some extent in the price arranged, and I would now ask you to let me have the offer on these terms."

This letter shows that the suppliants were then proceeding on the basis that there was something in the nature of a provisional agreement in existence for renting from the railway company, when in fact there was no such agreement.

On the 24th May, 1919, Sir Howard Frank sent the following telegram to the suppliants, which, with the reply, is alleged to constitute the contract (see ante, p. 369). On the 27th May, 1919, the suppliants sent the following telegram (see ante, p. 369). Sir Howard Frank telegraphed in reply (see ante, p. 369). And on the same date he wrote a letter in which he stated—"The contract is being prepared," etc. (see ante, p. 369).

On the 31st May, 1919, the suppliants wrote stating that they had seen the railway company, but that the clauses which the company proposed to insert in the agreement for letting would practically make it impossible for the suppliants to carry out any important scheme for the development of an industry such as they proposed, and they then said:—"While your offer clearly indicated that you were not taking responsibility for tenure of the premises, we take it that you are in a position to arrange that the railway company gives a letting free from such restrictive clauses as they suggest, which in our opinion are meant to guard private interests, or, alternatively, that you can acquire the ground by purchase, which Sir Howard Frank told our Mr. Thompson he would do if possible."

The Minister of Munitions did not see his way to deal with the railway company, and on the 14th of June, 1919, he wrote as follows to the suppliants (see ante, p. 371).

This letter appears to be a perfectly fair and reasonable one. Notwithstanding the two telegrams, which were supposed to close the bargain subject to contract, the suppliants were trying to require the Minister to enter into negotiations with the railway company, and the Minister having declined to do so, it was quite reasonable that he should require the suppliants to definitely state whether or not they were prepared to purchase. It shows that in the view of the Minister up to that date there was no binding agreement. The draft agreement was in perfect accordance with the terms mentioned in the telegram of the 24th May, 1919.

Notwithstanding the letter of the 14th June, 1919, the suppliants again wrote to the Ministry of Munitions referring again to their failure to come to an agreement with the railway company, and asking "is it not possible for you to demand an open and unconditional lease from them? It is apparent that the railway company do not want to rent the premises, and we shall be glad to hear from you whether you are in a position to compel them to give a lease at the rent suggested without imposing any restrictions as to trading."

The Ministry did not reply to this letter, as they may have reasonably thought that this subject had been definitely closed by their letter of the 14th June, and on the 19th June, 1919, Messrs. Henry and Son returned the draft agreement with their approval on it as amended by them. There were certain drafting amendments to which no exception could reasonably be taken, but a proviso was inserted which formed no part of the negotiations, and which certainly was a very grave alteration of the contract. The alteration referred to is as follows:—"Provided always that in the event of the purchaser being unable to obtain from the Great Southern and Western Railway Company of Ireland a lease of the said lands satisfactory to the purchaser, the purchaser shall be entitled within twelve months from the 1st July, 1919, to remove all the said buildings (other than foundations and concrete floors), together with all the machinery, plant, fittings and fixtures, pipes, electric cables, and wires, and stores, and tools, and all other property of the Minister in and upon the said lands, and during the period of the said twelve months shall have the unrestricted use of the said lands for the purposes of such removal, free of all rent, rates, taxes, and other outgoings of every kind, and purchaser shall not be liable to remove any of the foundations or concrete floors."

The agreement as altered was passed by the Ministry to the Treasury solicitor for his attention, and on the 1st July, 1919, the Treasury solicitor wrote to the suppliants' solicitors stating that the proposed revisions were wholly unacceptable, and that, having regard to the difficulties which had been raised in reference to the matter, the Directorate had decided not to proceed any further with the negotiations for the sale to the suppliants. On the 3rd July, 1919, Messrs. Henry replied that their revision only settled the draft in accordance with the contract as they understood it from a perusal of the original schedule of property as advertised and the correspondence, and they added that if the solicitor for the Treasury considered the draft agreement as furnished entitled their clients to get delivery of the property purchased, they were satisfied to sign it, and pay over the purchase price forthwith. On the 5th July, 1919, the Treasury solicitor definitely declined to proceed further with the negotiations for the sale, and the correspondence relied on closes with a letter from the solicitors for the suppliants dated 7th July, 1919, in which they state that they would take proceedings to enforce the contract.

It is contended on behalf of the suppliants that the telegrams of the 24th and 27th May, 1919, form a complete and binding agreement, and that the agreement is not the less binding, either because it is expressly stated to be subject to contract, or on account of the subsequent correspondence between the parties.

A large number of cases have been referred to as regards the effect of making an agreement subject to the preparation of a formal contract, but I do not think the general principle is anywhere better stated than it was by Lord Westbury in *Chinnock* v. *The Marchioness of Ely* (1): "I entirely accept the doctrine contended for by plaintiffs' counsel, and for which they cite the cases of *Fowle* v. *Freemen* (2), *Kennedy* v. *Lee* (3), and *Thomas* v. *Dering* (4), which establish that if there had been a final agreement, and the terms of it are evidenced in a manner to satisfy the Statute of Frauds, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties. As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged, or his agent lawfully authorized, there exist all the materials which this Court requires to make a legal binding contract. But if to a proposal or offer an assent be given, subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation." This passage was quoted with approval by the Court of Appeal in England in the case of *Rossiter* v. *Miller* (1), and by Lord Cairns in the same case in the House of Lords (2), and also by Jessel M.R. in *Winn* v. *Bull* (3). In the last-mentioned case the defendant entered into a written agreement with the plaintiff to take a lease of a house for a certain term at a certain rent "subject to the preparation and approval of a formal contract," and no other contract was ever entered into between the parties. It was held that there was no final agreement of which specific performance could be enforced against the defendant. Jessel M.R., referring to the authorities, states the principle thus:—"It comes therefore to this, that where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says, it is subject to and is dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract, it becomes a question of construction whether the parties intended that the terms agreed should merely be put into form, or whether they should be subject to a new agreement, the terms of which are not expressed in detail. The result is that I must hold that there was no binding contract in this case, and that there must therefore be judgment for the defendant."

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(1) 4 De G. J. & S. 638, at p. 645.

(2) 9 Vesey, 351.

(3) 3 Mer. 441.

(4) 1 Ke. 729.

In *Von Hatzfeldt-Wildenburg* v. *Alexander* (4) Lord Parker (then Parker J.) laid down the same principle in very clear words. He said (at p. 288):—"It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed

(1) 5 Ch. D. 648.
(2) 3 A. C. 1124, at p. 1139.
(3) 7 Ch. D. 29.
(4) [1912] 1 Ch. 284.

to will in fact go through. In the former case there is no enforceable contract, either because the condition is unfulfilled, or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract, and the reference to the more formal document may be ignored. The fact that the reference to the more formal document is in words which according to the natural construction import a condition, is generally, if not invariably, conclusive against the reference being treated as the expression of a mere desire."

Upon these authorities it would appear to me to be abundantly clear that there was no binding contract in this case constituted by the two telegrams.

The suppliants rely upon the case of *Bonnewell* v. *Jenkins* (1), but in that case Fry J., who tried it originally, and the Court of Appeal both came to the conclusion that there was on the correspondence a simple acceptance of the offer made by the plaintiff, accompanied by a mere statement of an intention that the arrangement should be reduced into a formal contract, and they held that, having regard to the authorities, the letters did constitute a binding contract.

In *Lewis* v. *Brass* (2) the Court of Appeal held that an intimation in the written acceptance of a tender that a contract will be afterwards prepared did not prevent the parties from becoming bound to perform the terms in the tender and acceptance respectively mentioned; but in that case also the Court came to the conclusion that the intention of the parties was thereby to enter into an agreement, and that the preparation of the contract was contemplated merely for the purpose of expressing the agreement already arrived at in formal language.

The suppliants also strongly rely upon the case of *North* v. *Percival* (3). Where certain "heads of agreement" had been entered into between a vendor and purchaser, and stated to be expressly "subject to approval of conditions and form of agreement" by purchaser's solicitor, it was held by Kekewich J. that the "heads of agreement" constituted a complete contract, and that the clause "subject to approval," &c., was not a condition precedent to a complete contract. I agree, however, with the

(1) 8 Ch. D. 70. (2) 3 Q. B. D. 667. (3) [1898] 2 Ch. 128.

criticism of Parker J. of this case in the case of *Von Hatzfeldt-Wildenburg* v. *Alexander* (1), where, having stated the rule in the terms which I have already quoted, he said: "*North* v. *Percival* (2) appears to be an exception to this rule; but I doubt whether that case was correctly decided. See the earlier decision of Sir George Jessel in *Winn* v. *Bull*" (3).

I have hitherto considered the legal aspect of the case on the construction of the two telegrams; but if the subsequent correspondence is referred to, the matter becomes even more clear. There are numerous authorities for saying that although two letters or, as in this case, telegrams standing alone may be evidence of a sufficient contract, yet a negotiation for an important term of purchase and sale carried on afterwards is enough to show that the contract was not complete.

In *Hussey* v. *Horne-Payne* (4) the House of Lords held that where a Court has to find a contract in a correspondence, and not in one particular note or memorandum formally signed, the whole of that which has passed between the parties must be taken into consideration, and in that case they decided that, although the first two letters of a correspondence seemed to constitute a complete contract, they were at liberty to come to the conclusion upon the whole of what had passed in letters and conversations that no concluded and complete contract had been established.

In *Bellamy* v. *Debenham* (5) the last-mentioned case was discussed by North J., and he came to a conclusion which seems peculiarly applicable to the present case. He said (at p. 495): "In the present case we find that the vendor's solicitors proposed to introduce into the formal contract terms which they had no authority whatever to introduce, or even to ask for, if they were at variance with the written agreement—which they had no right whatever to ask for, supposing that the letters written in April contained all the terms of the arrangement which had been then definitely arrived at. It is, therefore, a fair argument to say that it is impossible that the parties can have arrived at a concluded agreement when the vendor's solicitors took such a step as they did."

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(1) [1912] 1 Ch. 284.
(2) [1898] 2 Ch. 128.
(3) 7 Ch. D. 29.
(4) 4 A. C. 311.
(5) 45 Ch. D. 481.

In my opinion it is clear that the telegrams of the 24th and 27th of May, 1919, do not in themselves constitute a binding contract; and this conclusion is strengthened by the consideration of the subsequent correspondence, which proceeded on the basis that no concluded agreement had been arrived at, and which shows that the Ministry were anxious to have the draft agreement executed, while the suppliants were endeavouring to negotiate for new terms, which were definitely rejected by the Ministry.

I have come to the conclusion that there was no enforceable contract, and that consequently the judgment of Pim J. should be reversed, and the petition dismissed, with costs.

GIBSON J.:—

There are three questions before us for decision—1. Do the telegrams, apart from the words "subject contract," constitute a binding agreement? 2. What is the effect of the words "subject contract"? 3. Taking into consideration the entire correspondence before and after the telegrams and the draft assignment as amended, was a concluded contract established?

The relevant principles of law are clear. The only difficulty in each case is as to their application. Where an offer and acceptance are made subject to a subsequent formal contract, if such contract is a condition or term which until performed keeps the agreement in suspense, the offer and acceptance have no contractual force. On the other hand, if all the terms are agreed on, and a formal contract is only contemplated as putting the terms in legal shape, the agreement is effectual before and irrespective of such formal contract. Where there is correspondence in the course of which it is alleged that a contract has been created, the whole correspondence should be read; but if it appears that a final agreement was come to at any stage, subsequent attempts to introduce new and varied terms must be disregarded. Subsequent letters, however, debating as to terms already discussed, may be material in considering whether there is any previous concluded bargain. I do not propose to examine the correspondence in detail, thinking it sufficient to summarize my conclusions. There were a few interviews, what took place at which has not been proved, and we can only speculatively collect what took place thereat from expressions in the letters.

The vendor was the Minister, who, having taken possession, under the Defence of the Realm Legislation, of land owned by the Great Southern and Western Railway, and erected a factory and plant thereon, advertised the factory, stores, and plant for sale. The advertisement and schedule mentioned in Messrs. Henry's letter of July 3rd were not given in evidence. The Thompsons were a limited company, who, if the transaction was outside their ordinary trade, should perhaps have contracted under seal, but no objection in this respect has been made. Their main object was to run the factory for business purposes as a going concern, and for that object it was necessary to continue the use of the site, or at least secure sufficient time to enable the buildings, etc., to be removed or disposed of without loss. Without some fixed period for removal (such as is given in Deasy's Act, sect. 17), there would be obvious danger of controversy after the Minister had withdrawn from possession and conveyed the factory.

Sir H. Frank's attention was mainly directed to the value of what was offered for sale, but, though the factory occupying the site was to be sold, he never contemplated giving any title. The Thompsons, however, did not concur in this, as appears from the letters of 13th and 24th February and 11th March. Sir H. Frank did not deal with their proposal as to site till the letter of 26th April, when he refused to give any "assurance" (an ambiguous expression) that "the land can or will be acquired," adding, "but you are aware of the terms upon which it is held." How and when this information was given to the Thompsons is not disclosed. Whatever it was, they sent in an offer and letter, acknowledged in the letter of May 5th, which offer, obviously important, was not proved, but which imposed a condition as to a reasonable rent and term being arranged with the owners of the site. This appears from the letter in reply, where Sir Howard Frank declined to entertain any offer with such a condition. His letter of May 8th, answering a telegram, is to the same effect. The letter of May 19th does not further expressly refer to the topic. On May 22nd the Thompsons purport to describe their agreement already come to as being for sale of the factory complete and "to get possession of everything as it then stood for £21,500, subject to your provisional agreement for renting from the railway company." They refer to their object being to get the place as a going concern for industrial development, and treat the value of the chattels as the material matter for the Minister's decision. This letter of May 22nd is the immediate antecedent to the telegraphic offer of May 24th to sell for £24,200, a striking increase of amount, the factory, "as we hold it, including stores," except as therein. The telegram of acceptance requires definite information as to a holding agreement from the railway. Up to this, therefore, it seems clear that, though the Minister had declined all responsibility as to tenure of site, the Thompsons had never abandoned their notion that some kind of holding agreement had been arranged or could be arranged, which, if not existing or found to be impossible, would have enabled them to resist any action for specific performance or otherwise. Prior to making their final offer they had received a telegram from the railway, stated in their letter of May 31st, that the company would "stand by terms *re* land." The letter of 31st May admits that the Minister's offer clearly indicated that responsibility for tenure was not undertaken, but it assumes that the Minister is in a position to arrange with the company for a letting agreement. This was repudiated by Sir Howard Frank's letter of June 14th, enclosing draft agreement. On June 18th the Thompsons inquired whether the Minister could compel a lease. The letter of the 14th showed that the Minister treated the bargain as one which the Thompsons were at liberty to withdraw from if they declined to accept the draft. The Thompsons did not gainsay this view.

The draft described the premises by reference to plan and alphabet letters and certain machinery, plant, and fixtures, and certain stores and tools, as to which no inventory or schedule was attached. It did not purport to assign the lands, but a proper legal assignment of the premises, if required by the purchaser, was to be executed. The draft was returned with amendments, adding sanitary and other fittings, and a material proviso, securing right of removal for twelve months from 1st July, 1919. The revision was rejected, and the bargain was finally broken off on July 1st. The Messrs. Henry on the 3rd July explained that they had only settled the draft in accordance with the contract as they understood it from a perusal of the original schedule of property as advertised and the correspondence, and they offered to accept the original draft. This was declined.

Two other matters require notice. What was the subject-matter of the sale? The advertisement and schedule referred to by Messrs. Henry are not in evidence. The Thompsons describe what they proposed to buy in two letters. The first (February 24th) refers to the premises, etc., as described by the maps, drawings, and complete inventory, and schedule, made shortly before February 1st. They were not proved. The second letter (May 22nd) contains no such defining description. The telegraphic offer of May 24th only speaks of "factory, including stores," except as specified. The necessity of accuracy in describing what is intended to be sold is shown by *Harrison* v. *Knowles* (1).

The other point is as to the words "subject contract." In his letter (26th April) dealing with the tenure for the first time, Sir H. Frank expressly required that the offer should be in a satisfactory form, and a formal contract should be approved by the Chief Crown Solicitor. In his letter of May 8th he mentions "subject to contract," clearly referring to the letter of 26th. The telegram of 24th May means the same thing, a formal contract to be approved as in letter of April 26th. Considering the position of the Minister, his relation to the land of which he had taken possession without conveyance or title-deeds, and the exact area of which required definition to avoid controversy, the looseness of description, the uncertain character of the prolonged correspondence, and the persistent endeavours of the Thompsons to get some kind of holding tenure, long or short, a formal contract was, as a matter of business prudence, highly desirable. Otherwise the proposed purchasers might have had a loophole of repudiation on the footing of misunderstanding, and that there was no consensus ad idem; or at least they might have been supplied with topics of ad misericordiam appeal for abatement of price. The sudden increase of price from £21,500 might encourage a belief that the Minister might meet the purchasers' proposal in some way. With this summary of relevant facts, I now take up the three points stated at the beginning of my judgment.

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(1) [1918] 1 K. B. 608.

1. Omitting the words "subject contract," was the suppliants' telegram such an unconditional, unequivocal acceptance as would, with the offer, make a binding contract? It was easy to say "yes, accept." The telegram, which of course has no punctuation, adds "property being as represented"—apparently a condition. The word "property" includes the factory site; the inquiry as to the holding agreement shows this. What does "as represented" mean as to site and chattels? When, by what means, advertisement, plans, schedules, or by oral communications, such representation was made is left uncertain. The expression in the Minister's offer, "as we hold it," not being an explicit refusal in express language of the condition sought to be brought in by the Thompsons' letter of the 22nd May, their telegram apparently reintroduces the same term as still in being and operation. The expression in the letter of May 22nd, "as it then stood," compared with "as we hold it," might offer ground for evasion or misunderstanding. I do not understand why they did not send a short telegram of simple acceptance with a covering letter as usual. Instead, we have a verbose, argumentative telegram without any covering letter of explanation, and it is difficult to say from it that the Thompsons understood or accepted the proposed bargain in the sense of the offer. I doubt if their telegram was such a clear, unconditional acceptance as is necessary to the formation of a binding contract. As this point was not argued, I shall assume for the purpose of my decision (without deciding) that without the words "subject contract" there might have been an enforceable obligation.

2. Did this expression "subject contract" defer contractual obligation till a formal contract was settled, accepted, and executed; or does it mean that the purchase terms having been fully and finally settled, a further contract was only contemplated for the purpose of putting the bargain into legal shape, without substantial additions or alteration? I adopt the former

construction. Considering the position of the Minister and the limited company, the novel and somewhat loose character of the proposed bargain, the letters of the 26th April and the 8th May, the extreme brevity of the offer telegram, and the place in which, on the forefront of the telegram, the words occur, the expression conveys an essential condition without performance of which the proposed contract is incomplete. The telegram looks back to the letter of the 26th April, which interprets it.

3. Taking the whole correspondence, telegrams, and draft in its original and amended form comprehensively together, I arrive at the conclusion of fact that there was no complete and binding contract.

A decision against the suppliants on any one of the above three points would be fatal to their claim.

I do not deem it necessary to examine the authorities in detail. The law on the subject being settled, the only question is as to its application. The authorities only illustrate such application. Those in favour of the Minister's view are *Brien* v. *Swainson* (1) (the case of a telegram); *Winn* v. *Bull* (2); *May* v. *Thompson* (3); *Harvey's Case* (4); *Hawksworth's Case* (5); *Lloyd* v. *Nowell* (6); and *Von Hatzfeldt-Wildenburg* v. *Alexander* (7), so far as Parker J. decided as to the effect of a formal contract being required. The authorities mainly relied on for the suppliants, such as *Bonnewell* v. *Jenkins* (8); *Gray* v. *Smith* (9), were on language and circumstances quite unlike. The strongest case for the suppliants, *North* v. *Percival* (10), was doubted by Parker J. (11), with whose view I agree. To the same effect is the judgment of Neville J. in *The Santa Fe Land Co., Ltd.,* v. *The Forestal Land, Timber, and Railways Co., Ltd.* (12).

Mr. Healy's and Mr. Murphy's argument that the contract contemplated by both parties was confined to things exclusive of land, and that the authorities cited for the Minister were distinguishable on that ground, seems unfounded, as in part at least

(1) 1 L. R. Ir. 135.
(2) 7 Ch. D. 29, 32.
(3) 20 Ch. D. 703.
(4) 50 L. J. Ch. 750.
(5) 55 L. J. Ch. 335.
(6) [1895] 2 Ch. 744.
(7) [1912] 1 Ch. 284.
(8) 8 Ch. D. 70.
(9) 43 Ch. D. 208.
(10) [1898] 2 Ch. 128.
(11) [1912] 1 Ch., at p. 289.
(12) 26 T. L. R. 534.

the treaty concerned land, the premises or site on which the factory was constructed being a material element, certainly from the intending purchaser's point of view.

The cases as to correspondence need not be discussed. Those for the Ministers were *Ridgway* v. *Wharton* (1) and *Hussey* v. *Horne-Payne* (2), and for the suppliants *Bellamy* v. *Debenham* (3) and *Perry* v. *Suffields, Ltd.* (4). In the former case there was an appeal (5), in which the Court doubted the view which North J. had taken as to the letters forming a concluded contract. Accepting the criticism on Kay J.'s judgment in *Magg's Case* (6), I am not satisfied that it applies where the party alleging complete contract has all through persisted in claiming the same terms, and has actually brought them into the vendor's final draft. Such a case would be very different from one where wholly new terms were sought to be introduced on either side. Here the Minister did not treat the telegram as binding. His letter of the 14th July shows this. The suppliants did not question it. This point, however, does not require decision.

The judgment of my brother Pim must be reversed. I think it would be desirable to get an order beforehand for trial without a jury, as in *Marconi's Wireless Telegraph Co.* v. *The King* (7), and not allow the case to proceed to trial with a jury who could only be discharged by consent. A petition of right as to property or contract depending on documents is best disposed of by a Judge, as in the Chancery Division.

GORDON J.:—

The question in this case is: was there a concluded contract between Messrs. Thompson and the Ministry of Munitions? It is conceded that the persons purporting to represent the Ministry had power to enter into a binding contract. The question is: have they done so? Certain negotiations took place, partly by correspondence and partly at interviews; but it is agreed that these had not resulted in a concluded contract down to the 24th of May, 1919. These negotiations and the correspondence have been referred to in detail by the Chief Justice. On the 24th of May the representative of the Ministry sent to Messrs. Thompson the telegram which has just been read, and on the 29th of May Messrs. Thompson sent the reply which has also been read, and it is contended that these two telegrams constituted a binding contract between the parties.

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(1) 6 H. L. C., at pp. 268, 305.
(2) 4 App. C., at pp. 320, 328.
(3) 45 Ch. D. 481.
(4) [1916] 2 Ch. 187.
(5) [1891] 1 Ch. 413.
(6) 44 Ch. D. 616.
(7) [1918] 1 K. B. 193.

The law on the subject is not, I think, in doubt. It has been clearly and definitely expressed by Lord Westbury in *Chinnock* v. *Marchioness of Ely* (1) in the passage which has been read from his judgment, every word of which Lord Cairns in *Rossiter* v. *Miller* (2) says he accepts. Lord Westbury deals with an assent given, subject to a provision as to a contract, but the same principle applies if the offer is made subject to a similar provision: see *Lloyd* v. *Scowell* (3). The mere reference in the documents relied on as a concluded agreement to a contract to be executed will not prevent the operation of these documents as a contract if they contain all the terms of the agreement; and the contract referred to is merely for the purpose of putting these terms into a more formal document. *Bonnewell* v. *Jenkins* (4) and *Bolton Partners* v. *Lambert* (5) are examples of this. The distinction is stated by Lord Blackburn in *Rossiter* v. *Miller* (2) as follows:—"The mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared, embodying the terms, which shall be signed by the parties, does not by itself show that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not. But as soon as the fact is established of the final mutual assent of the parties, so that those who drew up the formal agreement have not the power to vary the terms already settled, I think the contract is completed"; and further on he says, "I think the decisions settle that it is a question of construction whether the parties finally agreed to be bound by the terms, though they were subsequently to have a formal agreement drawn up."

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(1) 4 De G. J. & S. 638, at p. 645.

(2) 3 App. Cas. 1124.

(3) [1895] 2 Ch. 744.

(4) 8 Ch. D. 70.

(5) 41 Ch. D. 295.

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Gordon J.

Then there arises the question as to what (if any) evidence or correspondence can be called in aid to assist in arriving at a conclusion as to whether the alleged binding agreement is in fact binding and conclusive. In the first place, the documents relied on must themselves be construed. If they contain anything to indicate that there may be matters which have been discussed but not finally settled, it then becomes permissible to look at the antecedent correspondence and negotiations to see what these matters are, and whether they have been finally disposed of by the alleged agreement. If a contract is complete, subsequent correspondence cannot alter it: *Perry* v. *Suffields, Ltd.* (1), approving of what North J. said in *Bellamy* v. *Debenham* (2). But subsequent correspondence may lead to the conclusion that there was no contract in fact.

Now, applying these principles to the present case, what is the construction of the two telegrams relied on? The offer to sell is made expressly "subject contract," and the acceptance asks that the draft contract should be forwarded, so that both parties knew that whatever they were doing was to be subject to a contract, as had indeed been specified in the letters of 26th April and 8th May that it would be: see *Winn* v. *Bull* (3). Jessel M.R. says:—"Where you have a proposal, or agreement, made in writing expressed to be subject to a formal contract being prepared, it means what it says: it is subject to and is dependent upon a formal contract being prepared." That is an unquestioned decision, and seems to me to be sound law and good commonsense, and, having regard to the facts of the case in which it was pronounced, it would, in my opinion, be sufficient to dispose of the present claim, even if there were nothing else in the case. But I think there is more. The offer describes what is to be sold as "Waterford Factory as we hold it, including stores, but excluding Board of Works property, and certain press shares of Gramophone Co., which is not factory property, as pointed out by Major Devine." The acceptance is qualified as follows:—"Condition as to B.O.W. and gramophone property being as represented," and asks for definite information as to holding agreement from railway, and to give facilities to compare stores.

(1) [1916] 2 Ch. 187. (2) 45 Ch. D. 481. (3) 7 Ch. D. 29.

What were the conditions which had been represented as to the B.O.W. and gramophone property? How had these representations been made? Were they made by Major Devine? Were they in writing or verbal? This uncertainty shows that there must be matters which can only be ascertained and determined outside the telegram, and which it might be necessary to have dealt with and defined in a duly considered contract. And when we look outside the telegram to Messrs. Thompson's letter of 22nd May, not to speak of previous letters, it is clear that there was much that was then unsettled in reference to stores and other property upon the premises. Then the offer is to sell the factory "as we hold it," and the acceptance asks for definite information as to holding agreement from the railway company. This at once suggests that the offer is being accepted on the basis that the offerers hold the factory under some agreement with the railway company, and that there must have been some reference to this in previous negotiations between the parties. When the antecedent correspondence is referred to, we see that the question of how the premises were held, or what additional terms could be secured, was the subject of discussion, and the terms had never been finally agreed upon. The subsequent correspondence shows that, so far from these telegrams having finally disposed of the questions, there is still a discussion going on as to the interest the Ministry had in the premises, and what terms might or might not be got from the railway company. The letter of the representative of the Ministry of 29th May and Messrs. Thompson's letter of 31st May are taken up with these matters. And on the 14th June the representative of the Ministry writes that they are not prepared to give any undertaking to acquire the lands, and it rests with Messrs. Thompson to make the best terms they can with the railway company, and adds: "The matter must be definitely settled without delay, and I have therefore to ask you to let me know by 27th inst. at latest whether you are prepared to purchase the buildings, machinery, stores, &c., on the terms of the draft agreement forwarded herewith." He does not say "whether you are prepared to carry out your agreement to purchase." And in reply to this Messrs. Thompson, on 18th June, say that the terms the railway seem determined to impose are such that the project of starting a factory would be quite impossible, and ask whether you (i.e., the Ministry) are in a position to compel them to give a lease at the rent suggested without imposing any restrictions as to trading. The next day the draft agreement was returned with the entirely new provision, which has been read by the Chief Justice, added. The Treasury solicitor said this was wholly unacceptable, and that it had been decided not to proceed further with the negotiations for a sale. In reply to this Messrs. Thompson's solicitor wrote the letter which has been read, and after some further correspondence these proceedings were commenced.

Now, the addition to the draft agreement, even though unwarranted by the contract, would not of itself, if not persisted in, destroy or prevent the operation of the contract if it already existed in fact, nor would it prevent the purchaser from suing on it if he abandoned all claim to more than the contract. But in my opinion the effect of this correspondence, including the addition to the draft, is to show that there was no antecedent concluded agreement, and that the matters which had been the subject of correspondence and negotiation prior to the telegrams were not finally and definitely determined by these telegrams; that the provision "subject contract" was a necessary and vital provision to ensure that before the parties were bound there should be such a document signed as would eliminate all questions of doubt as to what they were agreeing to, and that until this document was signed there was no final or concluded agreement between them. If the draft agreement had been signed there would be an end to the controversy. Until it was signed there was no concluded agreement, and an offer to sign after controversies had arisen could not create a contract which did not previously exist.

In my opinion, therefore, the decision must be reversed, and judgment entered for the Crown.

Solicitors for the suppliants: *Henry & Son.*
Solicitor for the Crown: *The Chief Crown Solicitor.*

H. J. M'C.

In the GOODS of KNOTT.

K. B. Div.
(Probate.)
1920.
April 19.
June 18.

Probate practice—Bodily infirmity of executor—Auxiliary grant of administration made to another person.

Where an executor's bodily health is such that he is unable to perform the duties of his office, the Court has jurisdiction to impound the grant made to him, and to make a grant of administration to another person, limited during the executor's incapacity.

Motion Ex Parte.

The deceased made her will on the 1st January, 1914, and a codicil thereto on the 22nd July, 1916. She died on the 24th December, 1919, and probate was granted to the Rev. J. G. Eames on the 19th February, 1920. The evidence showed that the Rev. Mr. Eames was a gentleman of eighty years of age, of very feeble health, and subject to seizures of an epileptoid character, and that he found himself unfit to verify accounts or to transact business requiring mental exertion. The deceased bequeathed a number of legacies amounting to about £6000, and left the residue of her personal estate, amounting to about £3000, among ten named persons.

By the direction of the Judge, the application, which had been opened on a previous day, stood over to enable the views of the residuary legatees to be ascertained. All the residuary legatees had been communicated with, and had signified their consent to the grant being recalled into the Registry, and a grant of administration made to Cecil Eames, one of their number. A verified consent by the executor to the revocation or suspension of the grant was also produced.

Longfield, for the applicants, the executor and Cecil Eames, referred to *In the Goods of Crump* (1). A supplemental grant of the kind required may be made when the executor is incapacitated from acting through bodily or mental infirmity—"durante

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(1) 3 Phil. 497.

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corporis aut animi vitio" (Oughton, Ordo Judiciorum, tit. 219, s. 1, n. (*a*), quoted by Sir Francis Jeune, P., in *In the Goods of Ponsonby* (1)). In *Powell* (2), cited in Tristram and Coote's Probate Practice, 15th ed., p. 239, a grant of probate made to three executors was revoked owing to the incapacity from nervous shock of one, and a fresh grant made to the other two, with leave to the first to apply for a grant on his recovery. But where a sole grantee is of unsound mind, the practice is not to revoke the grant, because to do so would break the chain of representation: Tristram and Coote, *op. cit.*, p. 245. I submit there is no distinction in principle between cases of mental and bodily infirmity. I ask that the grant made to the executor be impounded, and that Mr. Cecil Eames may be declared at liberty to apply for a grant de bonis non, with the will and codicil annexed, for the use of the Rev. J. G. Eames, limited during his incapacity.

KENNY J.:—

I think this is a proper case for an auxiliary or supplemental grant, and I will make an order in the terms suggested by Mr. Longfield. The consents of the residuary legatees will be referred to in the order.

Solicitors for the applicant: *Cathcart & Hemphill.*

T. C. T.

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(1) [1895] P. 287.

(2) Unreported.

THE GUARDIANS OF THE POOR OF THE LIMERICK UNION *v.* JOHN CASEY.

K. B. Div.
1920.
June 11.

(1917. No. 10293.)

Contract—Cancellation of—Powers of Guardians under the Poor Relief Act, 1838 (1 & 2 *Vict. c.* 56), *ss.* 3, 27, 92.

The Guardians of the Poor cannot cancel a contract definitely and finally entered into without the consent of the Local Government Board.

TRIAL OF ACTION.

This was an action brought by the Guardians of the Poor of Limerick Union against John Casey for damages for breach of a contract in writing dated the 10th day of October, 1916, by which the defendant contracted to supply the plaintiffs with potatoes at 8½*d.* per stone. The facts are as follows:—

By an advertisement dated the 15th day of August, 1916, the plaintiffs asked for tenders to be sent to them for the supply of best table potatoes from the 6th day of September, 1916, to the 1st of June, 1917. The defendant, in answer to this advertisement, tendered for the supply of potatoes for the period mentioned at 8½*d.* per stone, which tender was accepted by the plaintiffs. On the 10th day of October, 1916, a contract and bond of the kind required by the Local Government Board in respect of contracts made by Guardians of the Poor was signed by the defendant. After the signing of the said contract and bond, the defendant delivered potatoes to the plaintiffs as they required them up to the 1st day of November, 1916, on which date he wrote them the following letter:—

"I beg most respectfully to inform you that I am not able to supply potatoes to the Union, as they are all bought up by the military both north and south, and I had a man here to-day to know if I had any on hands, and I told him I had not, so I had to buy the eighty stone I sent you this day, and paid 1*s.* 2*d.* per stone for them. I have done my best for you up to the present. I must ask you to cancel my contract."

The minutes of the meeting of the Guardians held on the 1st of November, 1916, after the receipt of this letter, are as follows:—"Minute: Master to purchase in open market if Casey does not supply potatoes. The cancellation of contract was proposed and seconded. An amendment that Casey be recouped fifty per cent. of his loss was proposed and seconded. On a division the amendment was carried, and then the original resolution was put and carried. The sanction of the Local Government Board to the arrangement was requested."

A letter was immediately afterwards written to the Local Government Board asking for their consent, and, after having obtained some further information from the plaintiffs, the Secretary of the Local Government Board wrote as follows:—"The Local Government Board for Ireland have had before them the entries contained in the minute of proceedings of the Board of Guardians of the Limerick Union of the 1st and 22nd ultimo relative to the application of Mr. John Casey to have his contract for the supply of potatoes to the workhouse cancelled by the Guardians, and, with reference to the resolution on the subject, the Board desire to state that they cannot agree either to the proposal to cancel the contract or to recoup Mr. Casey fifty per cent. of his alleged loss in connexion therewith, as it would be contrary to their practice to do so in regard to a contract entered into so recently as September last."

On the 10th of January, 1917, Mr. Casey submitted a statement to the plaintiffs showing the loss he had sustained under his contract, and the plaintiffs again passed a resolution asking the Local Government Board to reconsider their decision in the case of Mr. Casey, potato contractor. To this the Local Government Board replied, again refusing to let Mr. Casey out of his contract.

On the 24th April, 1917, a letter was received from the Local Government Board stating that they would consent to the contract being terminated as from that date if the plaintiffs so desired. The Guardians again endeavoured to persuade the Local Government Board to cancel the contract as from the 1st November, 1916, and then as from the 1st December, 1916, but the Board definitely refused to do anything of the kind.

The plaintiffs were, during all the period from the 1st November, 1916, to the 24th April, 1917, forced to purchase potatoes in the open market as against the defendant's contract, and in the present action they claimed by way of damages the difference in price between what they had to pay and the price at which the defendant had contracted to supply them with potatoes.

M'Elligott K.C. and *L. O'B. Kelly*, for the plaintiffs:—

No power is given by the Poor Relief Act enabling the Guardians to rescind, and therefore the attempted rescission by them was ineffectual.

Lynch K.C. and *P. Kelly*, for the defendant:—

Contended that as the Guardians had admittedly a statutory power of making the contract without the sanction of the Local Government Board, they must be taken to have an equally absolute power of rescission, subject to the right of the Local Government Board to surcharge if the power to rescind were improperly exercised, and that in the present case there was no suggestion that the power was improperly exercised, as, in fact, the Local Government Board eventually consented to cancelling the contract as from a date later than that agreed on by the Guardians.

Pim J.: [His Lordship, having stated the facts as set out, proceeded:—]

The wording of the minutes is rather obscure, but I assume that a resolution cancelling the contract was adopted. From the evidence given before me the defendant was apparently present when this was done, and he must therefore have been aware of the last part of the minutes, which says that the sanction of the Local Government Board to the arrangement was requested.

So far as I can ascertain, the plaintiffs have never, at any time up to the present, claimed the power of cancelling a completed contract without the leave of the Local Government Board, and I am of opinion that, even supposing the resolution cancelling the contract were a good one, it can only be treated as a conditional cancellation, to become valid if the Local Government Board consented.

It was argued by Mr. Lynch K.C., on behalf of Mr. Casey, that the cancellation was good, on the ground that the power to cancel was implicit in the power to contract, and that in consequence no consent was required from the Local Government Board. This being a matter of law, which the parties were not at the time prepared to argue, I let the case stand over for argument on that point, but I put to the jury the following question:—"Did the plaintiffs purchase the potatoes set out in the statement of claim at the prices therein stated?" to which question the jury answered "Yes."

Now, I am of opinion, as stated above, that the cancellation of the contract was conditional, and that the defendant was well aware of that fact. I am prepared, therefore, quite apart from the law, with which I will deal hereafter, to hold that in this case there was no definite and final cancellation; but, as the question of law has been argued, I desire to consider it shortly. The sections to which I have been referred, and which touch this matter, are sects. 3, 27, and 92 of the Poor Relief Act, 1838 (1 & 2 Vict., c. 56), and Articles 15 to 21 of the General Regulations dated 18th December, 1882.

By sect. 3 it is enacted that "from and after the passing of this Act the administration of relief to the poor throughout Ireland . . . . shall be subject to the direction and control of the Commissioners, and . . . the Commissioners are hereby authorized and required from time to time as they shall see occasion to make and issue all such orders . . . . for the making of contracts in all matters relating to such management or relief, or to any expenditure for the relief of the destitute poor . . . . as they shall think proper." By sect. 27 it is provided that the Guardians of every union are authorized "to enter into and execute all such contracts connected with the relief of the destitute poor and with the purposes of this Act as shall be enjoined and permitted by order of the Commissioners." And by sect. 92 it is enacted that "any contract entered into by any Union . . . which shall not be made and entered into in conformity with the orders of the Commissioners, or otherwise sanctioned by them, shall be voidable, and, if the said Commissioners shall so direct, shall be null and void . . . and it shall be lawful for the Commissioners to direct the Guardians of any Union to take or institute any proceedings, civil or criminal, against any contractor who shall have violated the terms of any such contract, or who shall have been guilty of any fraud in relation thereto, and the expenses of such proceedings shall be paid out of the rates levied under the authority of this Act in the Union or Unions interested in such contract."

By Article 21 of the General Regulations of 1882 it is enacted that, where it is desirable or necessary to have no tender, with the consent of the Local Government Board first had and obtained, a specific contract without tender can be entered into by the Guardians.

The gist of all these sections and regulations seems to me to be this: that the Guardians of the Poor can enter into any contract they wish, provided it is in conformity with the orders of the Commissioners both as to the matter of the contract, to the steps to be taken, and to the form of the contract. Subject to that, they are free to contract as they like. But the rules are elaborate and strict, and without a definite consent from the Local Government Board they cannot go outside the regulations in any way; and if in special circumstances it becomes necessary to ignore the regulations, a specific consent thereto by the Local Government Board is required. There is nothing said in any of the sections I have quoted as to the cancelling of contracts, but it seems to me that it is implicit in them all that no varying, much less cancelling, of any contract is permissible without the consent of the Local Government Board. The last clause of sect. 92 makes the position of guardians and of the Local Government Board perfectly clear, for it enacts that, if at any time Guardians entered into a contract in the form permitted by the Local Government Board, the Board can under this section "direct"—that is, compel—the Guardians to take any necessary proceedings to enforce the terms of the contract. If Guardians have the power of cancelling contracts of their own motion, this clause becomes meaningless.

On reading all these sections together, I have come to the conclusion that Guardians of the Poor cannot cancel a contract definitely and finally entered into, without the consent of the Local Government Board; and, that being so, the plaintiffs must, on this ground also, succeed in the claim they make. So far as the purchases and the prices paid are concerned, the jury have found the claim to be valid.

Another point has been raised by the defendant in respect of purchases made after the 31st January, 1917, concerning which I am of opinion that the defendant is correct. On the 1st February, 1917, the Ministry of Food issued a regulation under the Defence of the Realm Act, whereby they fixed the price of potatoes for delivery in February, 1917, at £8 a ton, and of potatoes for delivery in March and April, 1917, at £9 a ton, that is, 1*s.* a stone in February and 1*s.* 1½*d.* a stone in March and April. The defendant says that, even if he be liable to the claim made by the plaintiffs, still they have no power to go behind this regulation or to charge him more than the difference between 8½*d.* and 1*s.* in February and 8½*d.* and 1*s.* 1½*d.* in March and April, 1917. I agree in this view, with one item of exception. On the 7th April, 1917, the Guardians purchased from the defendant himself 582 stones of potatoes at 1*s.* 8*d.* a stone, amounting to £48 10*s.* The plaintiffs certainly should not have incurred this liability; but it does not lie in the mouth of the defendant, the vendor, who also broke the law, to raise the point in respect of this item. The various items set out in the writ between the 24th February and the 7th April, 1917, must be readjusted; and, in regard to these items, save and except the item of April 7th, above referred to, the plaintiffs will only be entitled to recover the difference between the figures which I have given above. When the account has been amended in the way I direct, the plaintiffs will have judgment for whatever sum is thus shown to be due. The plaintiffs are entitled to their costs of the action.

Solicitor for the plaintiffs: *T. O'B. Kelly.*
Solicitors for the defendant: *R. M'Namara & Co.*

H. H.

LLOYD AND ANOTHER *v.* CORK COUNTY COUNCIL (1).

Appeal.
1920.
May 11, 12.

Criminal injuries—Personal injuries—Injuries committed within one mile of boundary of neighbouring county—Apportionment—Grand Jury (Ireland) Act, 1836 (6 *&* 7 *Wm.* 4, *c.* 116), *sect.* 140; *Local Government (Ireland) Act,* 1898 (61 *&* 62 *Vict. c.* 37); *Criminal Injuries (Ireland) Act,* 1919 (9 *Geo.* 5, *c.* 14).

Section 5, sub-s. 2, of the Local Government (Ireland) Act, 1898, extends to and includes injury to persons as well as to property, and gives jurisdiction in all cases to apportion compensation awarded for criminal injuries in the manner provided by section 140 of the Grand Jury (Ireland) Act, 1836. The power of apportionment given by that section is not limited to compensation awarded in respect of injuries to property.

Section 1, sub-s. 2, of the Criminal Injuries (Ireland) Act, 1919 (9 Geo. 5, c. 14), gives a wider power of apportionment than that conferred by section 140 of the Grand Jury Act, because it does not limit the jurisdiction to cases where the injury is committed within one mile of the boundary of a neighbouring county or counties.

Case Stated by Samuels J. at the Spring Assizes, 1920, for the County of Cork.

Owen T. Lloyd and Thomas Joseph Keane, warders in the County Cork Male Prison, had applied for compensation under the Criminal Injuries (Ireland) Acts for injuries received by them on November 11th, 1918, while in the discharge of their duties upon the occasion of the rescue from the gaol of a prisoner named M'Neilis. It was proved that M'Neilis came from the north of Ireland, and was arrested in the City of Cork, where he had obtained work temporarily. The applications for compensation were made against the County of Cork only. The prison where the occurrence took place is situate in the County of Cork, just outside the borough of the City of Cork and within one mile from the boundary of Cork County borough.

The Recorder of Cork awarded £200 compensation to Lloyd and £400 to Keane, to be levied off the rural district of Cork.

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(1) Before Sir James Campbell C., and Ronan and O'Connor L.JJ.

Appeal. 1920. LLOYD *v.* CORK CO. COUNCIL.

Notice was served upon the authorities of Cork County borough that upon the hearing of the appeal the District Council of the Cork rural district, being persons entitled to appear upon the applications, would apply to have the compensation apportioned, and a portion thereof placed upon the county borough of Cork.

On appeal, Samuels J. increased the amounts to £400 and £600 respectively, and apportioned the same as to one moiety upon the County of Cork, and as to the other moiety upon the City of Cork.

The question for the Court was: "Whether in the case of an application by a civil servant of the Crown for compensation under the provisions of the Criminal Injuries (Ireland) Act, 1919, where the application is made by the applicant against the council of the county in which the injury occurred, and such injury occurred within one mile of a neighbouring county, the Judge has power to apportion an amount of the compensation between the two counties."

Norwood K.C. and *Rearden*, for the Corporation of Cork, the appellants:—

The application for compensation in these cases is only sustainable by virtue of the provisions of the Criminal Injuries (Ireland) Act, 1919, and the County Court Judge or the Judge of Assize has no jurisdiction under that Act to apportion any part of the compensation between counties unless the applicant in his application so requests: sect. 1, sub-s. 2.

Under the Grand Jury (Ireland) Act, 1836 (6 & 7 Wm. 4, c. 116), there is no power to apportion compensation awarded in respect of maiming or murder of peace officers. That Act is divided into two separate and distinct compartments. One, consisting of sects. 106, 107, and 108, is conversant exclusively with personal injuries; the other, embracing sects. 135 to 140 inclusive, is confined solely to compensation for malicious injuries to property. Sect. 140 provides "that in case such burning or other malicious injury aforesaid (that is, other malicious injury to property) shall be committed on the verge or within the distance of one mile of the boundary of any two or more counties," the Judge at the Assizes shall have power and authority to apportion the amount of compensation amongst such neighbouring counties. Compensation for injuries to the person cannot be apportioned under sect. 140.

Sect. 5, sub-s. 2, of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), merely transfers to the County Court the actual powers of the Grand Jury, which had no jurisdiction to apportion, and the powers of a Judge of Assize under sect. 140 of the Grand Jury Act with respect to the apportionment of compensation; but, as already pointed out, these powers are limited to compensation for injuries to property. If there was a power under the Grand Jury Act to apportion compensation awarded for personal injuries, why was it necessary to insert in the Criminal Injuries (Ireland) Act, 1919, the provision that the County Court Judge or Judge of Assize may apportion where the applicant had in his application so requested?

Serjeant McSweeny (with him *G. J. Daly*), for Cork County Council, the respondents:—

Even without sect. 5, sub-s. 2, of the Local Government (Ireland) Act, 1898, the Judge could have apportioned the compensation in these cases. Sect. 5, sub-s. 2, of that Act uses, for the first time, the term "criminal injuries," and this applies to injuries to persons as well as to property. Sub-s. 2 enacts:— "Upon an application for such compensation the County Court Judge may either refuse the application, or make a decree against the County Council, and, if the decree is made, shall have the power of a Judge of Assize under sect. 140 of the Grand Juries Act, 1836, with respect to the apportionment of the compensation." The decree referred to includes every decree awarding compensation in respect either of person or property.

Sect. 140 of the Grand Jury (Ireland) Act, 1836, enables apportionment to be made where the injury to property or person is committed within one mile of the boundary of a neighbouring county or counties. In the Criminal Injuries (Ireland) Act, 1919, there is no limit as to distance, and the Judge is empowered under the conditions laid down in sect. 1, sub-s. 2, to put portion of the compensation on any neighbouring county or counties, irrespective of the distance of such county or counties from the county in which the crime was committed.

Norwood K.C., in reply.

Appeal.
1920.

LLOYD
v.
CORK
CO. COUNCIL.

SIR JAMES CAMPBELL C.:—

There is a certain amount of obscurity in the question we have got to determine by reason of some rather curious draftsmanship in one of the provisions of the Criminal Injuries (Ireland) Act, 1919. An application for compensation for criminal injuries, committed outside the borough of Cork, but within one mile of the borough boundary, was made against the County Council only; and the question raised upon appeal before Mr. Justice Samuels, and on which he stated this case, is whether he had power to apportion the amount of the compensation awarded between the County of Cork and the City of Cork. Prior to the Local Government (Ireland) Act, 1898, the power of apportionment in regard to compensation for malicious injuries is to be found in sect. 140 of the Grand Jury (Ireland) Act, 1836; and Mr. Norwood and Mr. Rearden have argued with considerable force that on its true construction that section is limited to claims in respect of property. Their argument was based mainly on the ground that sects. 106, 107, and 108 are a separate compartment of the Grand Jury (Ireland) Act of 1836, that everything relating to compensation for injury to the person is to be found within the four corners of these sections, and that no portion of the subsequent machinery of the Statute has any application to claims for compensation for injury to persons. Then it was suggested that sects. 135 to 140 constitute a second watertight compartment applicable only to malicious injuries to property.

I do not think this is by any means clear, because sect. 139 says:—"No action or suit for the recovery of any satisfaction or damages sustained by reason of any injury, for which the person or persons injured thereby may be entitled to apply for compensation under the provisions of this Act shall be brought," &c. These words plainly apply to all claims for compensation by any person injured, and embrace claims under the antecedent sections. If I am right in this view, and if sect. 139 includes claims under sect. 106, then that gets rid of the argument based on the contiguity of sect. 140 to sects. 135 and 137.

There is nothing in sect. 140 which necessarily limits it to property. Sect. 140 uses the words "such burning or other malicious injury as aforesaid"; and if sect. 139 is general in its application to all malicious injuries, it fortifies the view that sect. 140 also applies generally; but assuming that the contention of the appellants is right, and that sect. 140 is confined to claims in respect of property, we have then to consider the effect to be given to sect. 5 of the Local Government (Ireland) Act, 1898. It is plain that the intention of the Legislature in passing that section was to simplify the rather complicated legislation in regard to malicious injuries; and the first thing it does is to abolish the distinction between claims in respect of personal injuries and claims in respect of injuries to property. It applies a new term, "criminal injuries," ever adopted since, and this includes injuries to person as well as to property; and having got rid of all the difficult and complicated questions raised in the old days as to the meaning of the different sub-clauses in sect. 135, it says the Act shall extend to injuries to property of any description, real or personal, provided the malicious act done was a crime punishable on indictment under the Malicious Damage Act, 1861. It goes on to say in sub-s. 2 that "upon an application for such compensation (and this clearly means compensation in the wide sense I have mentioned) the County Court Judge may either refuse the application or make a decree against the County Council, and, if the decree is made, shall have the power of a Judge of Assize under sect. 140 of the Grand Juries Act, 1836, with respect to the apportionment of the compensation." It is impossible to limit the power given by sub-s. 2 to claims in respect of criminal injury to property; and we are coerced to find that it extends to and includes injury to person as well as to property.

It seems to me that this disposes of the question we have to determine here, subject to one point, pressed by Mr. Norwood and Mr. Rearden, namely, the somewhat inartistic form of the apportionment section in the Criminal Injuries (Ireland) Act, 1919. It seemed at first sight that there was great force in the argument that the power of apportionment in regard to criminal injuries to persons was to be found only in that section, and that it was to be exercised only if invoked by the applicant. That would lead to an extraordinary situation, because it would follow that the applicant, who may have no interest in the locality in which the money was to be raised and a substantial interest in getting the money, would have the power of determining the area of levy, with the result that in a case in which the Judge was satisfied that the area sought to be levied was not responsible, but that the adjoining district was, he would be deprived of all power of altering the area or apportioning the award by reason of the fact that the applicant had not asked him to do so. Serjeant McSweeny has cleared away any difficulty in my mind on that subject by pointing out that sect. 1, sub-s. 2, of the Act of 1919 gives a wider power than that conferred by sect. 140 of the Grand Jury Act, because sect. 140 is limited to where the injury is committed within the distance of one mile of an adjoining county or counties, whereas sect 1, sub-s. 2, of the Act of 1919 is not so limited. Where the injury is committed in county or district A the applicant may ask that counties or districts B, C, and D, as well as A, should be compelled to pay the levy.

The question put by Mr. Justice Samuels must be answered in the affirmative. We will make a decree accordingly in each case for the amount fixed by him, with costs.

RONAN L.J. :—

In this case I have arrived at the same conclusion as the Lord Chancellor; but, at the same time, if I were sitting alone I should like to look more minutely into the matter. The difficulty arises from the clause in sub-s. 2, sect. 1, of the Criminal Injuries (Ireland) Act, 1919, which provides that "the application may be made either as against the council of the county in which the murder, maiming, or injury occurred, or, at the option of the applicant, as against that council and the council or councils of any neighbouring county or counties, and in that event any compensation awarded may be apportioned by the County Court Judge or Judge of Assize as between the several county councils in such proportions as he thinks proper." It would seem as if the jurisdiction conferred by that clause was limited to cases in which the applicant elected to proceed against the councils jointly. The Lord Chancellor does not think it necessary to express any opinion, or to rely on that clause, inasmuch as the jurisdiction given by the Grand Jury Act applies, and I adopt the same view. His judgment is based on this: that sect. 5 of the Local

Government (Ireland) Act, 1898, gives jurisdiction in all cases to apportion in the manner provided by sect. 140 of the Grand Jury Act, 1836.

Sect. 5, sub-s. 2, of the Local Government (Ireland) Act, 1898, enacts that "upon an application for such compensation (that includes all compensation, and may be read as including compensation under sect. 106 of the Grand Jury Act) the County Court Judge may either refuse the application or make a decree against the county, and, if the decree is made, shall have the power of a Judge of Assize under sect. 140 of the Grand Jury Act, 1836, with respect to the apportionment of the compensation." If the decree is made under sect. 106, the County Court Judge has the power of apportionment. The difficulty that seemed to be created by sub-s. 3 of sect. 5 has been cleared away by Serjeant McSweeny. It clearly indicates that where the injury is committed within one mile of a county the council of that county has a right to appear. It would seem to me unreasonable to limit the jurisdiction given by sect. 1, sub-s. 2, of the Act of 1919 in the way suggested; but it is unnecessary for us to decide any question under that sub-section.

O'Connor L.J.—I agree.

Solicitors for the appellants: *B. C. Galvin & Son.*
Solicitors for the respondents: *T. Exham & Sons.*

C. L.

H. L.
1920.
April 23, 26, 27.
May 14.

[HOUSE OF LORDS.]

BRADSHAW *v.* M'MULLAN.

Landlord and tenant—Rates—Poor-rate—Lease at a rent "including rates and taxes"—Deduction—Indemnity—Estoppel—Res judicata—Local Government (Ireland) Act, 1898 (61 *&* 62 *Vict. c.* 37), *sect.* 52, *sub-s.* 2.

By a proposal in writing, dated the 1st December, 1908, and subsequently accepted, M. agreed to take from B. certain business premises for a term of thirty-one years, at the yearly rent of £240, "including all rates and taxes as at present existing or assessed on said premises," and M. further agreed to pay five-sevenths of all future or increased taxation caused by alterations or improvements stipulated for in the agreement.

In an action for rent by B. against M., M. claimed credit for the amounts of poor-rate paid by him. He also relied on certain prior proceedings and the findings therein as an estoppel, and as amounting to res judicata.

Held, by the House of Lords (1), that the provision as to rates was a "contract to the contrary respecting such deduction" within the meaning of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), sect. 52, sub-s. 2, and was void; that in the circumstances there was no estoppel; that the matter was not res judicata; and that M. was not entitled to the credit claimed.

The decision of the Court of Appeal, affirming that of a majority of the King's Bench Division (ante, p. 47), reversed, and the judgment of Campbell L.C.J. at the trial restored.

APPEAL by the plaintiff from an order of the Court of Appeal in Ireland (2), dated 22nd January, 1919, affirming the decision of the King's Bench Division setting aside the judgment entered at the trial by Campbell L.C.J. for the plaintiff.

Counsel for the appellant: *Serjeant Sullivan, G. N. Oulton K.C. W. E. Wylie K.C.,* and *James Geoghegan.*

Counsel for the respondent: *Jellett K.C.* and *Dickie K.C.* (with them *James Henry*).

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(1) Before LORD BIRKENHEAD C., VISCOUNT FINLAY, VISCOUNT CAVE, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

(2) Ante, p. 47.

THE LORD CHANCELLOR (1) [read by Viscount Finlay]:—

My Lords, I have had the advantage of reading the judgment of my noble and learned friend, Lord Atkinson. I concur in it, and have nothing to add.

VISCOUNT FINLAY:—

My Lords, this is an action to recover £140 alleged to be due for rent of certain premises in Dublin, the property of the appellant under demise to the respondent. The defence is that the appellant as lessor was bound to pay rates and taxes, but failed to do so; that the respondent, the lessee, paid £27 6*s*. 7*d*. for rates and taxes which should have been paid by the appellant, and that he was only liable for £112 13*s*. 5*d*., being the amount of rent claimed after giving credit for the said £27 6*s*. 7*d*., which amount, £112 13*s*. 5*d*., was paid into Court. The whole question in the case is whether it is the lessor or the lessee who is liable for the rates. The terms of the tenancy are contained in a letter dated 1st September, 1908, from the respondent to the appellant. The first paragraph of that letter is as follows:—"We propose to take a lease for a term of thirty-one years from the 1st day of January, 1909, of the premises hereinafter mentioned, at the yearly rent of £240, including all rates and taxes as at present existing or assessed on said premises, but we agree to pay five-sevenths (5/7ths) of all future or increased taxation caused by the alterations and improvements herein stipulated, said rent to be payable quarterly on the 1st day of April, and 1st day of July, and 1st day of October, and 1st day of January of each year, the first payment to be made, or an apportioned part of it, on the first of said gale days happening after our obtaining possession."

The respondent contends, and, in my opinion, rightly contends, that on the terms of this letter the rent of £240 was to cover payment of rates and taxes by the lessor. The substantial answer which the appellant makes is that this agreement is void by sect. 52 of the Local Government (Ireland) Act, 1898: "52 (1) The poor-rate shall be made upon the occupier, and not the landlord, of a hereditament, except where, under section 4 of the Poor Relief (Ireland) Act, 1843, it is made on the landlord as the immediate lessor of a house let in separate apartments or lodgings, and except that, if made heretofore in respect of a half rent under section 63 of the Poor Relief (Ireland) Act, 1838, and the enactments amending the same, it shall continue to be so made. (2) The occupier of a hereditament shall not be entitled to deduct from his rent any part of the poor rate, and any contract to the contrary respecting such deduction shall be void, subject, nevertheless, to the exceptions in this Act and to the provisions hereinafter contained respecting occupiers under existing tenancies."

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(1) The report of the judgments in the House of Lords has been printed from the shorthand notes of Messrs W. B. Gurney & Son.

The respondent denies that the second sub-section invalidates the agreement in the present case, and contends that the words of the sub-section merely take away the right of deducting the poor-rate from the rent, and do not prohibit a set-off against rent in respect of rates which ought to have been paid by the lessor, and which the lessee has had to pay for her. The respondent further contends that by certain proceedings in the Irish Courts the appellant is estopped from contending that the clause has the effect contended for by her. I shall deal with these two questions in the order in which I have mentioned them.

Section 52, sub-s. 2, prohibits the deduction by the occupier from his rent of any part of the poor-rate, and goes on to provide that any contract to the contrary respecting such deduction shall be void. The appellant contends that the lessor's agreement to bear the rate in consideration of the rent stipulated is void as being a contract to the contrary within the meaning of the second sub-section, and that therefore she is entitled, in spite of her contract to the contrary, to throw the burden of the rate upon the respondent. In my opinion the statute has the effect contended for by the appellant. The clause in the letter appears to me to contain a direct "contract to the contrary respecting such deduction" within the meaning of the sub-section. The argument for the respondent was that the words of the sub-section only relate to one particular mode of recoupment in respect of the rate—namely, by deduction from the rent. It was said that the right of deduction confers a "real" right upon the occupier entitling him to retain such an amount of the rent as corresponds to the

Viscount Finlay.

sum which he has paid for rates, and that this is very different from a mere right of set-off, or a right to be indemnified by the lessor in respect of such a payment. It appears to me that the appellant's construction of the sub-section is correct. "A contract respecting such deduction" refers not merely to a contract that the machinery of deduction shall be used to indemnify the occupier, but includes all methods of throwing upon the lessor the burden of the rates which the Act throws upon the occupier. "Such deduction," as used in sub-s. 2, denotes not merely the use of the machinery of deduction: it denotes the sum which is not to be deducted; and a contract that the occupier should have a right of set-off against his lessor in respect of payment of the rate, or a right to be indemnified by his lessor in respect of the payment, falls within the words of avoidance. It follows that as the stipulation that the tenant was to have the premises rate free is void, the appellant, in spite of the bargain which was made, is legally entitled to treat it as a nullity and to claim the rent, leaving the occupier to bear the rate in addition.

But it is further contended that the legal proceedings which have taken place estopped the appellant from setting up this contention. It is the case that the parties have acted upon the view that the bargain made by the agreement was a good and binding one, but no estoppel by conduct is pleaded, and, indeed, it does not appear that there was any change of position in consequence of the view taken of the contract which would constitute an estoppel in pais. The legal proceedings relied upon were: 1, a certificate as to the amount of rent due, given by the Chief Clerk on the 12th March, 1915, and acted upon by the Master of the Rolls; and 2, a Consent Order made on the 15th February, 1915, in an action in the King's Bench Division to recover the sum due for rent. As to No. 1, it is enough to say that though the point was mentioned before the Chief Clerk, it was never presented to the Master of the Rolls, and there was no adjudication upon it. As to No. 2, the Consent Order shows on the face of it that there was no adjudication on the point. The first clause of the Order is that the final judgment motion, dated 24th December, 1914, be struck out. The case for estoppel appears to me entirely to fail.

This case came in the first instance before the Lord Chief

Justice, who, on the 14th January, 1918, delivered judgment in favour of the appellant. His judgment was, however, reversed by the majority of the King's Bench Division Court, Mr. Justice Madden dissenting, and an appeal from that decision to the Court of Appeal was dismissed. I think that the result arrived at by the Lord Chief Justice and by Mr. Justice Madden was right, and that this appeal should be allowed.

VISCOUNT CAVE :—

My Lords, I concur, for the reasons contained in the judgment just delivered by my noble and learned friend.

LORD ATKINSON :—

My Lords, I concur. Three questions arise for consideration in this case. First, the construction of the agreement of the 1st of September, 1908. Second, the effect, if any, of the provisions of the 52nd section of the Local Government (Ireland) Act, 1898, upon that agreement when properly construed. And, third, whether by the legal proceedings which have taken place, or the conduct of the appellants or her agents, she is estopped from contending that the respondent is liable for the payment of the poor-rate on the premises demised, or agreed to be demised, and is entitled to deduct the whole or one-half thereof from the rent payable thereunder to the appellants. At the date of the agreement the entire premises, portions of which are comprised in this agreement, were valued and rated as a whole, the owner being treated as the occupier. But it was evidently intended that after the improvements contemplated had been effected and the demised premises practically re-modelled, the separate portions of the buildings held by different tenants should be separately valued and rated. This was done some years subsequently, but before the rent sued for became due. The clause in the agreement to be construed runs thus: "We propose to take for a term of thirty-one years from the 1st January, 1909, at the yearly rent of £240, including all rates and taxes as at present existing or assessed, but we agree to pay five-sevenths of all future increased taxation caused by the alteration and improvements hereafter stipulated." In my opinion this clause in effect throws upon the appellant as lessor the burden of ultimately paying the entire of the poor-rate not due to the contemplated improvements, and also of paying two-sevenths of the increase of the poor-rate due to the execution of those improvements. In *Barcroft* v. *Welland* (1) Baron Dowse had to construe a clause somewhat similar to this in an agreement by which certain premises were demised at "the yearly rate of £90 sterling, including all rates and taxes, to be paid by two equal payments of £45." He held that the words "all rates and taxes" meant "all rates and taxes assessed or charged upon the lands demised, or payable by a tenant in respect of his occupation of those lands," and that therefore the tenant was entitled to deduct from his rent the whole of the poor-rate paid by him. I am not aware that that decision has ever been questioned, though under the Irish Poor Law Code poor-rate is not a specific charge upon the land occupied, but only a charge upon the occupier in respect of his occupation of the land: *Lacey* v. *Concannon* (2). Poor-rate is in Ireland a poundage-rate made upon an estimate of the net annual value. It necessarily follows that it cannot be assessed upon any hereditament unless and until that hereditament has been separately valued. The person in occupation of rateable property at the time the rate is made is the person, and (save in the exceptional cases mentioned in the 1 and 2 Vict. c. 56, of which this is not one) the only person primarily liable to pay it. On his default his successor in occupation is bound to pay it (sect. 70). In the ordinary case no rate can be levied on the landlord who receives the rent issuing out of the rateable property and paid by the occupier thereof. The method by which such a landlord can be made to bear a portion of the burden of the poor-rate is by enabling the occupier to deduct from his rent a portion of the sum he has paid for poor-rate. The portion is now fixed at one-half the poor-rate paid. The deduction when made is treated as part-payment of the rent reserved. The receipt for the payment of the poor-rate must be accepted by every person entitled to receive rent in respect of the property for which the poor-rate is paid "in lieu of such sum of money and in full consideration of such portion of rent as the person tendering such receipt" is entitled to deduct from the rent (sect. 79). The

(1) 12 L. R. Ir. 35.

(2) 3 I. C. L. R. 557.

framers of the statute evidently attached so much importance to the throwing by this method upon the landlord a portion of the burden of the poor-rate that by the 77th sect. it was provided that if any person entitled to make the deduction mentioned from his rent covenanted, and agreed to forego to do so, that covenant or agreement should to that extent be of no effect. Thus the law stood for ten years. In the year 1849, during the famine, this section was repealed by the 12 & 13 Vict. c. 104, sect. 12. Sect. 52 of the Local Government Act, 1898, commences by enacting what was already the law, namely, that in all but the excepted cases the poor-rate should be made upon the occupier of a hereditament and not upon the landlord. This provision was apparently introduced to make all the more certain the realization of the object of the statute. If matters stood there the respondent would, under this agreement, have been able to double the appellant's ultimate liability for poor-rate by deducting from his rent all the poor-rate he was primarily liable to pay. Then comes the provision of the section which disables the tenant from doing this very thing, by enacting not only that he shall not deduct from his rent the portion of the poor-rate he was previously entitled to deduct, but that he shall not deduct any portion of it. My Lords, I am utterly unable to come to the conclusion that an agreement which would enable an occupier to deduct from his rent in respect of the poor-rate paid by him twice as much as he could but for the agreement legally have deducted from that same rent, is not a covenant respecting the sum which an occupier is entitled to deduct from his rent within the meaning of the section. I think this agreement is a contract respecting both the sum to be deducted and the operation of deducting it within the meaning of that section, and is therefore void.

Having formed this opinion, it is necessary for me to deal with the plea of estoppel so strongly relied upon. In most if not all proceedings which have taken place between the parties previous to the institution of the action out of which this appeal has arisen, what the respondent did and claimed he had a right to do was not at all to rely upon a contract of indemnity, but upon the right he would have been entitled to exercise under the agreement of the 1st September, 1908, if sect. 52 had never been enacted, namely, to deduct from the rent he owed the appellant all the poor-rate he paid in respect of the premises demised. In paragraph 19 of his statement of defence he purports to set forth the nature and reach of the estoppel he relies on, and the facts and circumstances which establish it. He avers that the plaintiff is estopped by the decision of the Master of the Rolls, by the consent mentioned in paragraph 12 of his statement of defence, and by drawing out of Court a sum of £12 13*s.* 5*d.* mentioned in paragraph 13 of that statement of defence, from denying the right of the respondent to credit for the rates and taxes paid by him in this action, and from claiming that the amount of rent payable to her is not at the rate of £240 per annum, less the amount paid by the lessee for rates and taxes. It is not quite clear whether the estoppel here relied upon is an estoppel by record—res judicata—or by conduct, or a mixture of both. The estoppel by conduct apparently consists in allowing the respondent credit as against his rent for various sums equal to what he had paid for poor-rate, which, if my construction of the agreement of the 1st September,.1908, be its true construction, the appellant was not bound to give credit for. It appears to me to be a new and mistaken notion that a creditor by taking from a debtor in payment of some gales of a recurring liability a sum less than he is entitled to demand in the shape of rent is therefore for ever debarred from insisting upon being paid what is legally due to him in respect of future gales of rent, the more especially as the debtor's position, instead of being prejudiced by being let off so cheaply, is rather improved. No estoppel by conduct is, in my opinion, proved.

The proceedings before the Master of the Rolls mentioned in paragraph 19 of the statement of defence were shortly as follows. The respondent had on the 17th December, 1913, executed in favour of the appellant a deed of charge by which he purported to charge certain property of his own, other than the property comprised in the agreement of the 7th September, 1908, with a certain sum of money alleged to be due for the arrears of the rent payable under this agreement. On the 26th June, 1917, an originating summons was issued out of the Court of the Master of the Rolls by the appellant, praying that it might be declared that the appellant was, under the deed aforesaid, entitled to a good charge on the lands mentioned therein; that an account might be taken of what was due to her for principal and interest in respect of the aforesaid charge; and that the respondent might be ordered to pay the same when ascertained within such time as the Court might direct. An affidavit was filed on behalf of the appellant to support this application. It was ordered by the Master of the Rolls that the lands charged should be sold; that an account should be taken of all debts, subsequent as well as prior to that of the appellant, due by the respondent; and that an inquiry should be held as to their priorities. Much reliance was, in argument, placed upon an affidavit filed on behalf of the appellant in support of this application. In paragraph No. 2 it is stated that the sum due covered by the charge is £500 with interest, less the amount to which the respondent in respect of rates and taxes for which he was not liable is entitled to credit. The account is set out in a schedule. It contains the words, "deduct taxes paid by the defendant as per account, for which he is entitled to have credit £29 13*s.* 2*d.*" On the 8th December the respondent filed an affidavit setting forth that on the revaluation of the premises contracted to be demised to him he had, on the 31st January, 1913, paid £54 1*s.* 8*d.*, the rates for the year 1912–1913 in respect thereof, and claiming credit for this sum in the account to be taken in reference to the charge, and alleging further that the appellant's agent represented to him that he was liable to five-sevenths of the increased taxation; that he believed him, but that he had been advised by counsel that he was not liable for any taxes, as the valuation was fixed on the rent of £240, payable by him, and not on the improvements made by him; and that he was further advised by counsel that he was entitled to credit for the full rates paid by him in January, 1913, in reduction of the amount secured by mortgage. The appellant's land agent made an affidavit in reply to this affidavit of the respondent, in which he alleges that he had himself paid on behalf of the appellant all the rates of 1910–1911 and 1911–1912; that he was willing to give the respondent credit in respect of the year 1912–1913 for £27 16*s.* 8*d.*, but that he had been advised by counsel that the appellant was not liable for the payment of any poor-rate made upon the demised premises. The respondent made a second affidavit—not raising any material issues; and ultimately the Master of the Rolls (the contest arising before the Chief Clerk, having on the 19th of March, 1915, being adjourned by him into Court) made an order that the respondent was not liable to pay the sum of £27 13*s.* 6*d.* (being five-sevenths of the rates and taxes for the year 1913–1914) on £75, the increased value, nor liable to pay the same proportion of taxes for the year 1912–1913. This order and the order that the property comprised in the mortgage should be sold were the only judicial determinations made by the Master of the Rolls in the suit. The cause never came up for further consideration on the Chief Clerk's certificate, and no final or other decree was ever pronounced. I am clearly of opinion that this order does not create an estoppel by matter of record. The consent alluded to in paragraph 12 of the respondent's affidavit was entered into in an action commenced by the applicant on the 8th of October, 1914, by a specially indorsed writ to recover from the respondent the sum of £140—seven months' rent due under the agreement of the 1st of September, 1908. On 11th January, 1915, the respondent delivered his statement of defence, in which, admitting that he held the premises the rent of which was sued for, he alleged that under the agreement the appellant was bound to pay all rates and taxes, and, further, that the agreement contained a clause binding the respondent to pay five-sevenths of any increased taxation covered by the improvements made by the respondent, but alleging that no increased taxation was imposed by reason of these improvements. In the seventh paragraph of the statement of defence it is alleged that after the issue of the writ in the action the respondent on 29th October, 1916, paid to the appellant the sum of £40, and on the 26th November, 1914, a further sum of £20, and on the 11th of December, 1914, a further sum of £10, making in all the sum of £70, and claimed credit for a further sum of £56 16*s.* 8*d.*, alleged to have been paid at the appellant's request and on his behalf for rates and taxes which the respondent claimed to set off, leaving a balance due of £13 3*s.* 4*d.*, which he brought into Court in full satisfaction of the appellant's claims pleaded. The case never went to trial. There never was any adjudication by the Court on any of the

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issues raised by the defence. Notice of a motion to mark judgment on the specially indorsed writ, notwithstanding the defence pleaded, was apparently served, and a consent was entered into and made a rule of Court, of which the following is a copy:—"The final judgment motion dated the 24th December, 1914, be struck out; that the plaintiff do have liberty to draw out of Court the sum of £13 3*s.* 4*d.* lodged with the defence in the action in full satisfaction of the amount sued for in the writ of summons herein; that the plaintiff be paid by the defendant the sum of £3 3*s.* as and for the costs of this action, in addition to a sum of £5 5*s.*, being the costs of the final judgment motion herein; and that the payment of the sum of £10 7*s.*, mentioned in the consent of the 26th November, 1914, be and is hereby waived by the plaintiff." Whereupon the only order made by the Court was the following:—"It is ordered that the said consent be received and made a rule or order of this Court and Division, and, accordingly, that the proper officer do draw in favour of the plaintiff for the sum of £13 3*s.* 4*d.* lodged in Court as aforesaid." It is ridiculous to treat this as any adjudication by the Court upon any subject in controversy. In my view, therefore, the defence of estoppel has not been in any way established. In my opinion, the language of the agreement clearly disclosed the common intention of the parties that the burden of paying all the rates and taxes should be thrown upon the respondent, and that the appellant should be relieved from bearing any portion of that burden, not, however, through the operation of any contract of indemnity, but by virtue of his right to deduct from his rent all the poor-rate he paid. I do not think it is legitimate to introduce by implication a contract of indemnity into the agreement, the existence of which the terms of the agreement do not suggest, and which the parties up to the last never relied upon, in order to bring about a result which in the main corresponds with what they desired by a different method to effect. The appeal, I think, succeeds. The judgment appealed from should, I think, be reversed, with costs. I concur with the judgments of the Lord Chief Justice and Mr. Justice Madden, both of which, I think, were right.

Lord Shaw of Dunfermline:—

My Lords, I concur. I respectfully agree with the opinion just delivered by my noble and learned friend, Viscount Finlay.

I venture further to offer these separate observations upon the point of estoppel. While the determination of that point does not appear to me to be in this case one of difficulty, yet it has been treated by the learned Judges of the Court below and in the arguments submitted to this House in such a manner as to induce me to give it special consideration. Estoppel is a well-known refuge for litigants in distress; the refuge is also well known to be frequently insecure. The present is a startling illustration of the extremes to which the attempts to seek cover under it may go. The estoppel here pleaded is estoppel by matter of record, and an examination of these proceedings shows that the substantial and specific plea is simply res judicata. In the system of jurisprudence with which I am more particularly acquainted the pleadings contain that plea in its own words. The form of "plea in law for the defender" is simply "res judicata." In England the substance of the matter is the same, although it enters the proceedings as a plea "by way of estoppel." It is possible, though I cannot think it is correct, that this substantial matter may be thus viewed from any different angle of principle.

The things familiarly stated as necessary to validate a plea of res judicata are: 1, that the parties should be the same; 2, that the subject-matter of the action should be the same; and, 3, that the media concludendi should be also the same. The rule of the civil law was thus stated in the Digest, xliv, 7, 4: "Et generaliter (ut Julianus definit) exceptio rei judicatae obstat quotiens inter easdem personas eadem questio revocatur vel alio genere judicii." But when that very learned author, Professor Mackey, in the standard work on Practice in Scotland, stated (vol. i, 588) that that rule contained the whole doctrine of res judicata, it is plain from other passages that he did not mean to leave out of account the fundamental fact that of course the question of res judicata can never truly arise unless you have got a judicium to start with. I should observe, my Lords, that even if the interlocutory order of the 15th February, 1915, had been a final decree in the cause, there would still remain the most formidable answers to the argument that the present suit was thus barred res judicata. To this I shall hereafter advert.

But, meantime, I return to the main question. My Lords, as I have observed, the overruling consideration with regard to res judicata is that there should have been a judicium. That is to say, that the merits of the identical dispute between the identical parties, on the identical subject-matter, and on the same media, should have been settled by judgment. The judicial mind should have been applied to it. This is the principle, familiar and fundamental. And it is confirmed by the highest authority. I refer in particular to *Jenkins* v. *Robertson* (1) and *White* v. *Lord Moreton's Trustees* (2). From the former case I venture to cite this passage from the opinion of Lord Romilly: "Res judicata, by its very words, means a matter upon which the Court has exercised its judicial mind, and has come to the conclusion that the one side or the other side is right, and has pronounced a decision accordingly; but when an action of declarator is brought, and a verdict is obtained by the pursuers, and that is set aside, and then an arrangement takes place by which, in consideration of the payment of a sum of money, an interlocutor is pronounced for the defenders, and the Court simply registers that interlocutor, without expressing any judicial opinion on the subject, I am of opinion that it is contrary to all principle to consider that that can be treated really as res judicata." That case referred to a right of way, and involved the point whether an individual might constitute himself a representative of the public in an action of declarator, so as to preclude an action by any other person. But the words of Lord Romilly deal with the question of res judicata as a general topic, in a manner and on principles which I, of course, entirely accept, and from which, in neither country so far as I know, has there ever been an attempt at variance. It is, I am aware, possible to maintain that a judgment by consent has the qualities of a judicium to which I have referred. There are expressions of opinion in some of the numerous English cases upon the subject. It seems to me that such a doctrine may be founded, not upon the judgment pronounced, but upon the consent with all its limits and to all its extent which preceded the judgment; that, in short, you have there left the region of strict res judicata, and entered the region of a possible wide estoppel. This, my Lords, is a difficult country, and it is not necessary at present to enter into it, because I am clearly of opinion that the facts of the present case do not raise the particular point. The suit between the parties to the present appeal had no reference to the deduction claimed in this action. It had reference to a different and an earlier deduction; the former suit did not ask for any declaration of general or future liability; and, with regard to consent to a judgment being obtained, the consent was to something quite different. The consent was to the very opposite—namely, "that the final judgment . . . motion be struck out." Struck out, accordingly, it was, and no final judgment exists between these parties.

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(1) 5 M. (H. of L.), at p. 34; and L. R. 1 Sc. App. 117.

(2) 3 M. (H. of L.), at p. 60.

Further, my Lords, I desire to make this observation. I do not see my way to sanction the application of this specific plea of res judicata, or the more general plea of estoppel, to any transaction such as the present, which is in plain defiance of statutory injunction. Such a plea, if allowed, would place the Courts of the country in open conflict with the determination of the Legislature. It is necessary to see definitely how this matter stands. By section 52 of the Local Government (Ireland) Act, 1898, it is enacted: 1, "The poor-rate shall be made upon the occupier, and not the landlord, of an hereditament." Further, by sub-s. 2, it is provided that: "The occupier of an hereditament shall not be entitled to deduct from his rent any part of the poor-rate, and any contract to the contrary respecting such deduction shall be void." My Lords, this language is very plain, and, in my opinion, so peremptory that it is not open to Courts of Law to avoid giving it effect in all cases on the subject which are brought under judicial notice.

The parties in this case, according to the plea of one of them, have contracted out of the provisions of the Irish Local Government Act, although that Act made clear to them that such contracting out was not legally permissible. They have chosen to arrange their affairs upon another footing. The plea of res judicata arises in this way, that under proceedings in a former suit the parties chose to settle on the footing of recognizing the agreement and contravening the Act. How does the law stand relative to such a plea? It may well be that had the landlord brought a suit, notwithstanding that arrangement for refund of the money which he had improperly allowed to his tenant in that suit, the landlord would have failed. But he would not have failed on the ground of res judicata. He would have failed upon another ground—namely, that when parties have violated legal or statutory duties or injunction, they are prohibited from asking the assistance of Courts of Law to rectify the position in which they have involved themselves so far as the past is concerned. The rule which prevails in such cases is simply "melior est conditio possidentis." But with regard to the future, whether the debt be under a gambling contract or a contract such as the present, when the attention of Courts of Law is directed to the foundation of the demand, no decree of a Court can be obtained to enforce a claim in defiance of the prohibition of a statute. I am of opinion that it would be of the worst example to sanction the introduction of the doctrine of estoppel, in any of its phases, into such a transaction. When once a Court of Justice is asked to give judicial effect to a transaction which a statute distinctly forbids, in my opinion its duty is to refuse. It ought not to do by a form of law what is essentially contrary to the law.

To apply these views to the present case, of the prohibited deduction of poor-rate in Ireland, for reasons of policy with which the judiciary dare not concern itself, there is a definite proscription by the Legislature. By that Judges are bound, and their duty, in this House and elsewhere, I conceive all your Lordships agree to be simply to apply the Act according to its sound and plain interpretation. It does not assist that interpretation, my Lords, nor is it required, to make any refinement nor introduce any trouble by reason of the employment merely of the word "deduct" in the statute. Putting the two sub-sections of the Act together, I think they simply mean that the tenant shall pay the tax, that the landlord shall not, and that the tenant shall not be permitted to throw the burden of it upon the landlord. It is a mere circumvention of the Act to say that an agreement of a tenant to pay rent inclusive of tax, and then take credit for the tax receipts as if they were equivalent to part of the agreed-on rent, is not in truth an agreement for deduction.

Questions put.

That the order appealed from be reversed.

The Contents have it.

That the judgment of the Lord Chief Justice be restored.

The Contents have it.

That the respondent do pay to the appellant her costs here and below.

The Contents have it.

Solicitor for the appellant: *Herbert Z. Deane*, Agent for *Wm. Smyth & Son*, Dublin.

Solicitor for the respondent: *Herbert S. Baron*, Agent for *S. G. Rutherford*, Dublin.

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Criminal Law and Procedure (Ireland) Act, 1887 (50 *&* 51 *Vict. c.* 20), *s.* 4—*Fair and impartial trial—Place of trial.*

Where the defendant applies to the Court to discharge or vary an order made on the certificate of the Attorney-General under 50 & 51 Vict. c. 20, s. 4, changing the place of trial of a defendant charged with a crime committed in a proclaimed district, and satisfies the Court that the trial can be more fairly and impartially had in a county other than the county named in the order of removal, it is the duty of the Court under the statute to order that the trial shall take place in the county in which it shall appear that the trial can be most fairly and impartially had.

Motion on notice for an order that the order made on the 9th June in these proceedings, changing the place of trial of the prisoners to the Court of Assize in the County of the City of Londonderry, be discharged, and that, in lieu thereof, it may be ordered that the place of trial of any indictment to be found against the defendants be changed to the County of Cork, the County of the City of Cork, or for such other order as to the Court might seem meet or just.

The defendants had been returned for trial to the next Assizes for the County of Cork upon the charge of wilfully murdering Private William Jones at Fermoy on the 7th September, 1919.

On the certificate of the Attorney-General, the Court, on an application by the Crown, made the order of the 9th June, now sought to be discharged.

The motion was grounded on an affidavit of Mr. J. S. Troy, the solicitor for the defendants, who referred to the order of the 9th June, and deposed—

"Of the said defendants, the said Michael FitzGerald, John Mulvey, Thomas Griffin, Patrick Leahy, Peter O'Callaghan, and John J. Hogan, were all arrested in the month of September, one thousand nine hundred and nineteen. The defendant Leo O'Callaghan was arrested on the twelfth day of November, one thousand nine hundred and nineteen; and the said Daniel Hegarty was arrested on the 6th day of March, one thousand nine hundred and twenty.

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(1) Before Molony C.J., and Gibson and Kenny JJ.

The said defendants, who have all been in custody since the dates of the respective arrests, were returned for trial on the 13th day of April, 1920, on the said charge to the next Assizes for the said County of Cork. All of the said defendants are men in a humble position of life, they are all workingmen, and all are natives of the County of Cork, and were resident in the said County at the time of their said arrest, and all are members of the Roman Catholic Church.

"2. The population of the County of Cork (exclusive of the City of Cork), as taken at the last Census, and appearing in Thom's 'Official Directory' for the present year, is three hundred and ninety-two thousand one hundred and four. The population of the City of Cork taken from the same source is seventy-six thousand six hundred and seventy-three; the number of names appearing in the Common and Special Jurors' books for the County of Cork in the present year are eleven thousand seven hundred and twenty-one and two hundred and sixty-seven respectively; the number of names appearing in the Common and Special Jurors' books for the City of Cork in the present year are six hundred and two hundred and four respectively. Both the Common and Special Jurors' books for the County of Cork contain hundreds of names of gentlemen differing in their political views and religious creeds from the above-named accused, gentlemen of position and standing, and of independent views, wholly impartial between the Crown and the accused in any criminal case, no matter what its nature, gravity, or importance. A panel selected from either book, particularly from the Special Jurors' book of the said County of Cork, having regard to the unlimited right of 'stand by' of the Crown, and the limited right of challenge of the accused, would be certain to enable the Crown to obtain a jury absolutely impartial and fearless to discharge their duty in the present or any other case. This observation applies with equal force to the Special Jury Panel of the City of Cork; and I beg to refer to the orders recently made by this Honourable Court on the application of the Attorney-General changing the place of trial in several special Crown cases to that venue.

"3. With regard to the venue selected by the Attorney-General for the trial of the present case, I say that I believe, for the reasons hereinafter set forth, that a fair and impartial trial of the present case could not be had in the same venue. As I have already set forth, all of the above-named defendants are Roman Catholics, and it is notorious that the fiercest sectarian feeling and prejudice exist in the said City of Londonderry at the present time. It cannot be pretended that within the last few weeks fierce rioting attended with loss of life has not taken place in the City of Londonderry, continuing on one occasion for almost a week, and I say advisedly that to have this case tried by a jury selected from a panel consisting almost exclusively of gentlemen who are not Roman Catholics is not calculated either to secure justice for the accused, or even the appearance of justice. Furthermore, the very fact of changing the place of trial of these accused from the extreme south of Ireland to the extreme north, and from the province of Munster into the province of Ulster, is calculated to give the case a complexion of a political or quasi-political character that would render it impossible for the case to secure that calm and patient consideration where the issue is one of life or death.

"4. The population of the City of Londonderry, taken from the same sources as aforesaid, is forty thousand seven hundred and eighty, and from inquiries that I have made I verily believe that the Special Jurors' books of the City of Londonderry contain a very much smaller number of names than appears in either the Special Jurors' books of the County or City of Cork; and I beg to refer to the proceedings in this Honourable Court in the case of the *King* v. *O'Brien and Others* (1), in which this very question was considered by the Court on the application to change the venue in that case. The state of feeling at present existing in Londonderry amongst all classes of the population is far more intense than that which existed on the date of the hearing of the application in that case.

"5. I say, moreover, that having regard to the pending legislative proposals of the Government for the partition of Ireland into two distinct parts, with separate Judiciaries and systems of government, and having regard to the reasons that have been advanced for these proposals by the Government on the certificate of whose Attorney-General it is now proposed to transfer the trial of these Southern Catholics into the northern province of Ulster, such transfer is calculated to still further prejudice the fair trial of this case and render it impossible for the defendants to obtain justice or a fair hearing for their defence.

"6. I say in conclusion, on behalf of the said accused, that they are quite willing to take their trial in any venue in Ireland outside of the six counties of Ulster, of which the present Government proposes to make a separate political entity from the remainder of Ireland."

The following further affidavits were filed for the hearing of the motion:—

Sir Henry Arthur Wynne, Chief Crown Solicitor for Ireland, deposed that he

"was informed by Mr. Young, Crown Solicitor for the County and City of Londonderry, and by Mr. Gregory, the County Inspector for these counties, and believe that a perfectly fair and impartial trial in this case can be had before a Special Jury for the City of Londonderry. I beg to refer to the affidavits made by these gentlemen, and filed herein.

"3. Having regard to the circumstances under which the offence charged in this case was committed, I say that, from information that has come to me officially, I believe that it would not be possible to secure a fair and impartial trial of this case in the venues suggested by Mr. Troy. In the County and City of Cork the intimidation that has been and is being exercised, and the terrorism that obtains, would render a fair trial impossible. I beg in this connexion to refer to the affidavit of Mr. Anthony Carroll, Crown Solicitor for Cork County, filed in this matter, and to a true copy of the affidavit sworn by Mr. Jasper Travers Wolfe, Crown Solicitor for Cork City and Cork County, West Riding, filed in the case of *The King* v. *Patrick Maher and Others* (1), on which, marked "A," I have written my name prior to swearing this affidavit.

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(1) Unreported.

"4. As regards the County of Dublin and the City of Dublin, I beg to refer to the affidavits of Colonel Walter Edgeworth Johnstone, the Chief Commissioner of the Dublin Metropolitan Police, and of Mr. Roberts, Assistant Inspector-General, who, up to recently, was County Inspector of the Royal Irish Constabulary for the County of Dublin. It is certain that in the City of Dublin are the headquarters of the murder association which plans and carries out many of the murders and attacks in the city and county, and that jurors in the City and County of Dublin would, with good reason, be apprehensive that if they found a verdict of guilty in such a case as this they would be singled out for murder and attack.

"5. I say that the only prospect of having a fair trial in this case is in a venue where the jurors can be reasonably certain that if they act on the evidence, and find a true verdict in accordance with it, they will not be exposed to murder and attack, and will not be marked men simply because they have found a true verdict in such a case."

Exhibit "A," referred to in Sir Henry Arthur Wynne's affidavit:—

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"I, J. Travers Wolfe, of Skibbereen, in the County of Cork, Crown Solicitor for the County Borough of Cork, and for the West Riding of the County Cork, make oath and say as follows:—

"1. I have read what purports to be a copy of an affidavit sworn in this case by Mr. John J. Power, Solicitor, on the 23rd day of February, 1920.

"2. I have a very close knowledge of the jurors of the City of Cork. I have practised as a solicitor at the Cork Assizes for the last twenty-six years, and since my appointment as Crown Solicitor in June, 1916, I have necessarily had a particular knowledge of the jurors of the City of Cork.

"3. In my opinion there is at the present time no possibility whatever of a fair and impartial trial of this case being had before a jury of the City of Cork. I beg to refer to the statements contained in paragraph 6 of the affidavit of the said John J. Power. Assuming the facts stated in that paragraph to be correct, it would be impossible at the present time to proceed to a trial in this case in the city of Cork with anything like a reasonable chance of obtaining a fair and impartial jury prepared to do its duty. As the result of the methods adopted by the unlawful organization referred to in the said paragraph of Mr. Power's affidavit, a very real terror exists amongst large numbers of the jurors of the City of Cork of the consequences that might ensue if they returned a verdict other than a verdict of acquittal of the accused. Since my appointment as Crown Solicitor for the City of Cork, I have over and over again been approached, both directly and indirectly, by numbers of jurors on the panel, and asked to stand them by if called on to serve in cases such as this. I have over and over again been assured by or on behalf of jurors of the City of Cork that if they were allowed to serve in cases such as this they would be afraid to discharge their duties impartially, owing to the fear that if they did so they would be exposed to the danger of death, or violence, or injury to their property, or ruin to their business. I have had these applications from jurors who would ordinarily, in my opinion, be most courageous, firm, and impartial in the discharge of their duties as jurors, but who have now become, in cases such as this, owing to the terror and intimidation to which they have been exposed, absolutely unfit and incapable of discharging their duties as jurors.

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(1) Post, page 440.

"4. In my opinion the fear prevailing amongst many of the jurors of the City of Cork to which I have referred is real, and substantial, and well founded; and I do believe that if a jury of the City of Cork was to find in this case a verdict other than one of acquittal of the accused, the lives, persons, and property of the members of the jury would be in grave danger."

Mr. Anthony Carroll, Crown Solicitor for the East Riding of Cork, in an affidavit stated that he had

"charge of this prosecution, in which the depositions of thirty-six witnesses were taken against the defendants, who are returned for trial for the wilful murder of a soldier at Fermoy on the 7th day of September, one thousand nine hundred and nineteen, when they attacked, seized, and took away a number of rifles.

"2. I read a copy of the affidavit of Mr. Troy filed herein, and, in reply to the second paragraph thereof, I do not believe that a common jury of the County or City of Cork would, owing to the disturbed state of the country, give a fair and unbiassed verdict on the evidence on the trial of these defendants on said charge.

"The County of Cork Special Jurors have not to my knowledge been summoned to try any criminal case. I know a large number of the gentlemen in the East Riding of Cork County who comprise that panel. They reside in and through the country districts, and some are business men in the country towns. I believe those jurors, owing to the present unrest through the county, would approach the trial of this case with a great amount of trepidation, and consequently the evidence would not be weighed with that calm and impartial mind which is necessary in the interest of justice.

"The Special Jurors of the City of Cork contain the names of gentlemen, a number of whom are independent, upright, and impartial jurors, who heretofore have, in my experience, found verdicts according to the evidence. The disturbed state of the City of Cork, and the country generally, has much reduced the number of those impartial and independent jurors, and it is idle for anyone to suggest that the present disturbed condition of the South of Ireland would not influence any jury empanelled in Cork to try a case such as this in arriving at a verdict."

Mr. John ffolliott Young deposed that he was

"Crown Solicitor for the County of Londonderry and for the County of the City of Londonderry, and have been practising as a solicitor in the County and City of Londonderry for twenty-five years.

"2. I have read the affidavits sworn by John S. Troy, Solicitor, on the 14th day of June, 1920, and filed in this matter.

"3. The number of names appearing in the Special Jurors' books for the County of the City of Londonderry is one hundred and thirty-eight. I am well acquainted with many of the persons on the said books of the said Special Jurors, and I am certain that a fair and impartial trial of the present case could be had by the Special Jurors of the County of the City of Londonderry.

"2. None of the said Special Jurors belongs to the class of persons who took part in the recent rioting in the City of Londonderry, and none of the said jurors are in the least likely to be biassed against the accused on account of the said rioting.

"5. I am strongly of opinion, from my knowledge of the said Special Jurors, that no sectarian feeling and prejudice would prevent them from giving a fair and impartial trial to the present case, or any other case that might come before them. The Special Jurors of Londonderry City have in the past shown great discrimination and impartiality in their verdicts, as has been shown by the cases tried by Special Jurors at the last few Assizes. I am further of opinion that in cases where the venue has been changed from other counties to the County of the City of Londonderry the said Special Jurors would not convict unless the evidence against the persons charged compelled such a verdict.

"6. I do not believe that the pending legislative proposals of the Government for the partition of Ireland would in the least tend to prejudice the fair trial of this case before the Special Jurors of the County of the City of Londonderry."

Mr. Vere Gregory stated in his affidavit:—

"1. I have just been appointed County Inspector for the County and City of Londonderry, and took up duty as such on the 16th day of June instant.

"2. I have discussed with my predecessor, Mr. Carey, who was County Inspector for the County and City of Londonderry for over eleven years last past, and with my men, the names of the persons on the Special Jury Panel for the City of Londonderry, and am informed by them and believe that a

City of Londonderry jury will return a fair and impartial verdict, and act on the evidence alone in any case that may be submitted for trial to them.

"3. I have read a copy of the affidavit made by Mr. Troy, filed herein, and I say that I believe from official information communicated to me, and from my own observation, that there will be no prejudice whatever against the defendants on the part of a Londonderry Special Jury, and that the disturbances referred to by Mr. Troy, and the present disturbances in Derry, will in no way affect the minds of the Special Jury of that city. The said disturbances are confined to certain areas, and the persons whose names are on the Special Jury Panel are in no way connected therewith, and will not be influenced thereby.

"4. In reference to the third paragraph of the said affidavit of the said Mr. Troy, I say that it appears from the official returns, and I believe that over 56 per cent. of the population of Londonderry City are Roman Catholics, and I say it is not accurate to state that the Special Jury Panel consists almost exclusively of gentlemen who are not Roman Catholics."

Mr. Albert A. Roberts, Assistant Inspector-General of the Royal Irish Constabulary, deposed that he was

"County Inspector of the Royal Irish Constabulary for the County of Dublin for over three years and until the 31st day of March last past, and have a considerable knowledge of the County, and of the names and descriptions of the gentlemen on the Special Jury Panel for the County of Dublin.

"2. I am quite satisfied and depose that it would in my opinion be absolutely impossible to secure a fair and impartial trial of this case in the County of Dublin, as many of the jurors through terrorism and fear of the consequences would be afraid to find a verdict of guilty if the case were proved.

"3. The city of Dublin is the headquarters of the Sinn Fein organization, and of the murder gang responsible for the many murders and crimes recently committed in the city and county, and its operations extend into the County of Dublin, all the constituencies in which have returned Sinn Fein Members of Parliament, and undoubtedly the organization is powerful in the said county.

"4. The shocking murders that have been committed in the City of Dublin, and the attempt on His Excellency's life in the County of Dublin, show how daring and desperate this murder gang is; and I am firmly convinced that even in the case of those who would sincerely desire to act on the evidence and in accordance with the obligations of their oath, the fear of the consequences will deter even those from doing their duty.

"5. Moreover, in consequence of the conditions obtaining in the County of Dublin at present, it has been found necessary to withdraw Police from seven police barracks, and this involves that the policing of the districts previously served by those barracks cannot be effectively carried out, and consequently persons in those areas have not the same police protection as they would have under normal conditions.

"6. The inhabitants of those areas and the Special Jurors residing therein are well aware of this, and naturally must feel how unsafe and dangerous it would be for them to incur the hostility of the said murder gang; and I firmly believe that this feeling of insecurity and dread would weigh greatly with the jurors, and would deter them from finding a true verdict if the evidence warranted a conviction.

"7. I am also firmly convinced that in present conditions it would be throwing too great a burden on the Special Jurors of the County of Dublin to ask them to try this case, and I believe that should any of such jurors find a verdict of guilty in the case, if the case was proved to their satisfaction, the jurors so finding such a verdict would be exposed to imminent danger of outrage, if not of death."

Mr. Walter Edgeworth Johnstone, Chief Commissioner, Dublin Metropolitan Police, stated in an affidavit that he had been

"Chief Commissioner of the Dublin Metropolitan Police since January, 1915, and have a considerable knowledge of the names of the persons on the Special Jury Panel for the City of Dublin.

"2. I say that the City of Dublin is the headquarters of the murder organization which is responsible for the shocking murders that have been committed in the city in recent months.

3. Mr. Redmond, Assistant Commissioner, Dublin Metropolitan Police, and five members of the Dublin Metropolitan Police have been murdered, and several other members of the force seriously wounded, and some of the offences have been committed under circumstances of very great daring, the perpetrators plainly relying on the terror that they have created to deter any persons from giving evidence against them, and on the fact that even if evidence to prove their guilt was forthcoming a city jury would be afraid to find a verdict against them.

"4. I believe that it would be quite impossible to obtain a fair and impartial trial of this case in the City of Dublin, as such of the jurors who would recognize the Court would of necessity be influenced by the probable consequences to themselves should they convict the prisoners."

Lynch K.C. and *FitzGerald* (with them *Joseph O'Connor*), for the defendants.

Wylie K.C. (with him *Holmes*), for the Crown:—

The affidavits and authorities having been opened and commented upon by counsel, Mr. Wylie, on behalf of the Crown, stated that without abandoning the County of the City of

Londonderry, where the Crown still considered that a fair and impartial trial could be had, he was willing that the venue should be removed to the County Donegal.

Lynch K.C.—We cannot now accept that venue. This is the first time we have heard County Donegal suggested.

Molony C.J.—Do you ask for an adjournment?

Lynch K.C.—No, my Lord.

[Authorities cited and discussed: *The Queen* v. *Conway* (1), *Hunt's Case* (2), *Palmer's Case* (3), *R.* v. *Duggan* (4).]

MOLONY C.J. delivered the judgment of the Court:—

On the 13th April, 1920, the defendants herein were returned for trial to the next Assizes for the County of Cork upon the charge of wilfully murdering Private William Jones at Fermoy on the 7th September, 1919.

On the 7th June, 1920, the Attorney-General gave a certificate that he believed a more fair and impartial trial could be had at the Court of Assize in the County of the City of Londonderry than in the County of Cork, and on the 9th June, 1920, an application was made to this Court on behalf of the Attorney-General to change the venue to the County of the City of Londonderry, and this Court made the order, as, of course, it was bound to do under sect. 4 of the Criminal Law and Procedure (Ireland) Act, 1887. The same section gives the defendant or defendants the right to apply to the Court to discharge or vary such order upon the ground that the trial can be more fairly or impartially had in a county other than the county named in the order of removal. In pursuance of this right the defendants in the present case now apply to discharge the order of the 9th June, 1920, and that in lieu thereof it may be ordered that the place of trial be changed to the County of Cork or the County of the City of Cork.

Under the section it lies upon the defendants to show that the trial can be more fairly and impartially had in a county other than the county named in the order of removal, and when we are satisfied as to this, it becomes our duty to order that the trial

(1) 7 I. C. L. R. 507.
(2) 3 B. & Ald. 444.
(3) 5 E. & B. 1024.
(4) I. R. 7 C. L. 94.

shall take place in the county in which it shall appear that the trial can be most fairly and impartially had.

It is stated in the affidavit of Mr. Troy, solicitor for the defendants, that all the defendants are men of humble position in life, and are all workingmen, natives of the County of Cork, and were resident in the said county at the time of their arrest, and he then proceeds to give his reasons for believing that a fair and impartial trial of the present case could not be had in the City of Derry, namely—1, that all the defendants are Roman Catholics, and that it is notorious that fierce sectarian feeling and prejudice exist in that city at the present time; 2, to have this case tried by a jury consisting almost exclusively of gentlemen who are not Roman Catholics is not calculated to secure justice for the accused; and, 3, to change the place of trial from the extreme South to the extreme North of Ireland, and from the Province of Munster to the Province of Ulster is calculated to give the case a complexion of a political or quasi-political character that would render it impossible for the case to secure calm and patient consideration.

It is, unfortunately, true that rioting of a very serious party and sectarian character has taken and is taking place in the City of Derry, which since the Attorney-General gave his certificate has assumed even a more formidable character. This fact is not denied in the affidavits put in on the part of the Crown; but it is stated by Mr. Young, the Crown Solicitor, that none of the city Special Jurors belongs to the class of persons who took part in the recent rioting in the City of Derry, and that the said Special Jurors are not in the least likely to be biassed against the accused on account of the said rioting.

Mr. Vere Gregory, the County Inspector, who only arrived in Derry a week ago, cannot speak with, and does not pretend to have, any personal knowledge. He admits the facts of the disturbances. He does not deny their character; but he says that, from official information communicated to him, and from his own observations, he believes the present disturbances will in no way affect the minds of the Special Jurors of that city. Unfortunately, however, we have the fact admitted of this party and sectarian rioting, undoubtedly accompanied by fierce political and religious

K. B. Div. 1920.

THE KING *v.* FITZGERALD.

Molony C.J.

excitement, and we do not think it would be right to send eight prisoners from the South of Ireland to be tried in such an atmosphere at the present time. It is no doubt true, as stated by Mr. Young, that none of the Special Jurors belongs to the class of persons who took part in the rioting; but it is unquestionable that the excitement which prevails must affect all classes of persons, and even possibly the safety of the jurors—a matter especially dealt with in sect. 4, which refers to danger to lives, property, and business of jurors. It is further said that the jurors of the City of Derry are an excellent tribunal, against whom no imputation can be made, and that by removing the venue we cast such an imputation upon them. We entirely disclaim any such intention, as this Court has already done in cases such as *R.* v. *Conway* (1) and *R.* v. *Duggan* (2); and I myself have already discussed this aspect fully in my judgment delivered a short time since in *R.* v. *Maher and Others* (3).

We are satisfied upon careful consideration of all the circumstances that we ought not to leave this venue in Londonderry, and consequently we have to consider where the trial can in our judgment be most fairly and impartially had. Mr. Wylie, whilst still supporting Londonderry, has suggested the County of Donegal as an alternative—a proposal which the defendants' counsel refused to accept. The defendants propose the County or the City of Cork, and Mr. Troy in his affidavit asserts that in either of these venues the Crown could obtain a jury "absolutely impartial and fearless to discharge their duty in the present or any other cases." On the part of the Crown, Mr. Anthony Carroll, the Crown solicitor, who has charge of this case, has made an affidavit, in which he says that he does not believe that a common jury of the County or City of Cork would, owing to the disturbed state of the county, give a fair and unbiassed verdict on the trial of these defendants. When, however, he comes to deal with a Special Jury, he does not make any such sweeping assertion, but speaks in extremely guarded language. As regards the jurors of the City of Cork, he says: "The Special Jurors of the City of Cork contain the names of gentlemen, a number of whom are independent, upright, and impartial jurors, who heretofore have, in my experience, found verdicts according to the evidence." He continues by stating that the disturbed state of the City of Cork, and the country generally, has much reduced the number of these independent and impartial jurors, and he thinks it idle for anyone to suggest that the present disturbed condition of the South of Ireland would not influence any jury in trying a case such as the present.

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(1) 7 I. C. L. R. 507.

(2) I. R. 7 C. L. 94.

(3) Post, page 440.

Sir Henry Wynne in his affidavit makes an exhibit of an affidavit sworn by Mr. Travers Wolfe, the Crown Solicitor for the County Borough of Cork and the West Riding of the County of Cork. This affidavit was made on the 24th of February, 1920, in the case of *The King* v. *Maher and Others* (1), and in it Mr. Wolfe confines himself to the assertion that it would be impossible to obtain a fair and impartial trial of that particular case before a jury of the City of Cork. The affidavit, however, contains some general observations from which it might be inferred that it would be impossible to obtain a fair trial in the City of Cork for any capital, or, indeed, any serious case, by reason of the intimidation which prevailed.

If Mr. Wolfe's affidavit has the sweeping meaning attributed to it by Sir Henry Wynne, it is at variance with my own judicial experience and in contrast with the action of the Attorney-General himself, who since last March has applied to this Court to change the venue in six different cases to the County of the City of Cork, three from the County of Kerry, and three from the County of Clare. These were cases of much gravity, comprising murder, attempted murder, and shooting at with intent to murder. At the Winter Assizes last December I tried many cases, including cases of changed venue, and was perfectly satisfied with the result in all of them.

We therefore will discharge the order obtained by the Attorney-General ex parte, and order that the trial be had in the County of the City of Cork, being the venue in which the Court is of opinion the trial can be most fairly and impartially had, and, in accordance with the statute, the Court awards that the reasonable costs incurred by the defendants in making the application shall be paid by the Crown.

Solicitor for the defendants: *J. S. Troy.*
Solicitor for the Crown: *Anthony Carroll.*

H. J. M'C.

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(1) Post, page 440.

1920.
Feb. 26, 27.

R. *v.* MAHER AND OTHERS (1).

The defendants were returned for trial to the next Assizes for the County of Limerick on a charge of wilful murder of Sergeant Peter Wallace, R.I.C., and Constable Michael Enright, R.I.C., at Knocklong, in that county. On the Attorney-General's certificate, under the provisions of the Criminal Law and Procedure (Ireland) Act, 1887, the Court, on the 19th February, made an order that the trial should be had in the City of Belfast. Counsel for the defendants asked that the place of trial should be changed to the County of the City of Cork, the County of the City of Dublin, or the County of Dublin; but on the hearing of the application counsel for the accused limited the application to the County or City of Dublin.

Healy K.C., *Lynch K.C.* (with them *Joseph O' Connor*), for the defendants.

Wylie K.C. (with him *Holmes*), for the Crown.

The material portions of the affidavits, filed on the hearing of the application, appear in the judgment of Molony C.J.

[The authorities cited and discussed were the same as those in the *King* v. *FitzGerald and Others* (ante, page 428)].

At the conclusion of the arguments, Wylie K.C. intimated that the Crown would be willing to accept the County of Armagh as the venue for the trial.

MOLONY C.J.:—

On the 24th January, 1920, Patrick Maher and five other persons were returned for trial to the next Assizes for the County of Limerick on a charge of wilfully murdering Sergeant Peter Wallace, R.I.C., and Constable Michael Enright, R.I.C., at Knocklong, in the said county.

The Attorney-General gave a certificate under the provisions of sect. 4 of the Criminal Law and Procedure (Ireland) Act, 1887, that he believed a more fair and impartial trial could be had at a Court of Assize in the County of the City of Belfast, and on reading the said certificate this Court on the 19th February instant made an order that the trial should be had in the said city.

The accused, in pursuance of the powers given to him by the same section, now apply to this Court to discharge the order of the 19th instant, and in lieu thereof to order that the place of trial be changed to the County of the City of Cork, the County of the City of Dublin, or the County of Dublin. On the hearing of the application, however, Mr. Healy withdrew that portion of the application which referred to the City of Cork, and limited his application to the County or City of Dublin.

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(1) Before MOLONY C.J., and KENNY and PIM JJ.

The duty of the Court, when such an application is made, is to order that the trial shall be had in the county in which it shall appear that the trial can be most fairly and impartially had.

A number of affidavits have been filed for the purpose of assisting the Court in coming to a decision; and it will be necessary for me to refer to them briefly. Mr. Power, the solicitor for the accused, in an affidavit grounding the motion, refers to the nature of the charge against the accused, and submits that it is essentially a case which, in the interests of justice, should only be tried in a venue removed as far as it is humanly possible from any suggestion of strong political bias or feeling; and he gives reasons for suggesting that such feeling would be found in the City of Belfast, and not found in the County or City of Dublin. In answer to Mr. Power's affidavit, several affidavits have been put in. Colonel Edgeworth Johnstone, the Chief Commissioner of the D.M.P., states that the City of Dublin is the headquarters of the murder organization which is responsible for the shocking murders that have been committed in the city in recent months; and he refers to the fact that Mr. Redmond, Assistant Commissioner, and five members of the D.M.P. have been murdered, and several other members of the force seriously wounded, and that some of the offences have been committed in circumstances of very great daring, and he believes that it will be quite impossible to obtain a fair and impartial trial in this case in the City of Dublin. Mr. Roberts, the County Inspector of the County of Dublin, swears that the operations of the murder organization extend into the County of Dublin, and swears to his belief that should any of the jurors find a verdict of guilty in the case, if the case was proved to their satisfaction, the jurors so finding such a verdict would be in imminent danger of outrage, if not of death.

We heard these affidavits read with great regret, as in our experience at the Bar and on the Bench we have always found the jurors of the County and City of Dublin to do their duty with fairness and courage; but we do not think that we are at liberty to disregard the sworn testimony of the chief peace officers in the City and County of Dublin, who must necessarily be conversant with the state of affairs existing at the present time.

As regards the City of Belfast, there is a conflict of testimony. Mr. Moorhead, the Crown Solicitor, and Mr. T. J. Smyth, the Commissioner of Police in Belfast, the Acting Deputy-Inspector of the R.I.C., swear to the fair and impartial manner in which juries of the City of Belfast discharge their duties; but Mr. Power, both in his original affidavit, and in his affidavit in reply, has alleged that political prejudice and passion in the City of Belfast are constantly excited by the Press and by pronouncements of powerful organizations and individuals, and that a political atmosphere has been imported into this case which he suggests would undoubtedly be operative in the minds of Belfast jurors. In our experience Belfast jurors have always performed their duty satisfactorily; but it is suggested in Mr. Power's affidavit that there would be a danger of some of the jurors being affected by political feeling. In these circumstances the words of Lefroy C.J. in *Quinn* v. *Conway* (1) are important. After dealing with *Hunt's Case* (2), which was discussed by Mr. Lynch yesterday, he says, at p. 536 of the report:—"Here, then, in a case decided in 1820, we have a Court acting, not upon the principle of its being possible to find twelve honest and impartial men, but upon the principle that there might be, from the state of the county, a large portion of the panel affected, and unfairly affected, by prejudice or partiality. The rule of law does not require it to be alleged that A or B or any number of jurors are so affected, or will be so affected; but if they are placed under circumstances which make it reasonable to presume or apprehend that they may be actuated by prejudice or partiality, the Court will not, either on behalf of the prosecutor or traverser, allow the trial to take place in that county, for, as has been already well observed, this is not a rule to be carried out for the benefit of the Crown only. Under any such circumstances as these to which I have adverted, the Crown or the traverser would have an equal right to the same measure of justice. It is a wise and jealous rule of law to guard the purity of justice that it should be above all suspicion."

These words of my distinguished predecessor seem to me to be well worthy of remembrance at the present time. I have always thought that the greatest blessing a country can enjoy is that the heart and mind and conscience of a people approve of and co-operate with the administration of the law; and we should therefore try to select a venue which will not only ensure a fair and impartial trial to the accused, but will convince them that they are being fairly treated, and leave no rankling sense of injustice to dwell in their hearts. In a word, we should aim at seeing, as far as possible, not only that the administration of justice is pure, but that it should seem pure to every litigant, whether the Crown or an individual.

Applying these principles to the present case, and leaving out, as we feel bound to do, Belfast on the one hand and Dublin on the other, we have endeavoured to find a venue in which, in our opinion, within the words of the statute the trial can be most fairly and impartially had; and we have come to the conclusion that the County of Armagh, which has been accepted by the Crown, satisfies these conditions, and we accordingly place the venue in that county.

KENNY J.:—

In concurring with the proposed order, I wish to say that I do so for the reason that the Crown has expressed its willingness to accept the County of Armagh as the venue for the trial. Had the Crown ultimately pressed for the retention of Belfast as the place for trial, it seems to me that there are no circumstances in the case to justify us in concluding that an absolutely fair and impartial trial could not be had in that venue. It was a venue selected by the Attorney-General in pursuance of the power vested in him by the 4th section of the Criminal Law and Procedure Act, 1887—a section which imposes the grave responsibility on him in cases within the section: to ensure that, so far as he can effect it, a trial may be had which will be fair and impartial alike to the accused and to the community which is represented by the Crown.

Pim J.:—I agree with the Lord Chief Justice.

Solicitor for the defendants: *John J. Power.*
Solicitor for the Crown: *James J. Gaffney.*

H. J. M'C.

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(1) 7 I. C. L. R. 507.

(2) 3 B & Ald. 444.

Appeal.
1920.

May 11.

STOKES *v.* TRACEY (1).

Practice—Judgment—Action for recovery of land—Order 14, *r.* 1—*Specially indorsed writ—Tenancy "duly determined by notice to quit"—Order* 3, *r.* 6 (*F*).

In an agreement for a tenancy from year to year there was a clause providing that, in the event of the landlord requiring the premises for the purpose of letting or selling same along with adjoining premises, he should be entitled to determine the tenancy by a month's notice to quit. Alleging that the event mentioned in the agreement had happened, the landlord served notice to quit upon the tenant, and at its expiration served a specially indorsed writ for recovery of possession of the premises. An order for final judgment was made by the King's Bench Division.

Held (reversing the King's Bench Division), that the words "duly determined by notice to quit" in Order 3, rule 6 (F), refer to cases in which the determination of the tenancy is a legal consequence of the contract, and do not apply where the right to serve the notice depends on express agreement between the parties; and accordingly, that plaintiff could not obtain leave to enter judgment for recovery of the land under Order 14, rule 1.

Arden v. *Boyce* ([1894] 1 Q. B. 796) and *Gleeson* v. *Keown* (32 I. L. T. R. 150) followed.

Appeal from an order of the King's Bench Division granting the plaintiff's motion for final judgment in an action for the recovery of possession of premises for over-holding. The special indorsement on plaintiff's writ was as follows:—"The plaintiff is entitled to possession of the shop and premises No. 1 Upper George's Street, Kingstown, in the County of Dublin, which was by agreement dated the 3rd day of July, 1918, let by the plaintiff (as Receiver over the estate of Philip P. Hynes) to the defendant as tenant from year to year from the 24th day of May, 1918, which tenancy was duly determined by notice to quit, expiring on the 1st day of March, 1920."

The agreement was for a tenancy from year to year at a rent of £1 a week. It contained the following clause:—"In the event of the landlord, or any person or persons, company or companies, for or on whose behalf he is Receiver, or the said Philip Hynes, requiring to obtain possession of the premises hereby let for the purpose of letting or selling same along with the Central Hotel premises, or for the purpose of negotiating for such letting or sale, or in the event of the said weekly rent of £1 being in arrear for four weeks, the landlord shall be entitled to determine the tenancy hereby created by giving unto the tenant one calendar month's notice to quit, in writing, such notice to be left at, or sent by post, addressed to the tenant at the premises, No. 1 Upper George's Street, Kingstown."

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(1) Before Sir James Campbell C., and Ronan and O'Connor L.JJ.

The notice to quit was in the following terms:—"Whereas the Yorkshire Fire and Life Assurance Company, on whose behalf I am Receiver, require to obtain possession of the shop and premises No. 1 Upper George's Street, Kingstown, in the County of Dublin (which you now hold of me as such Receiver under agreement dated the 3rd day of July, 1918), for the purpose of selling same, along with the Central Hotel premises: now I hereby give you notice to quit and deliver up the said shop and premises known as No. 1 Upper George's Street, Kingstown, in the County of Dublin, on the 1st day of March, 1919. Frank Stokes, Receiver over the estate of Philip P. Hynes. Dated this 31st day of January, 1920."

By a clerical error the date for giving up possession was stated to be "the 1st day of March, 1919," instead of "the 1st day of March, 1920." The validity of the notice to quit was challenged on this ground; but in view of the opinion expressed by the Court during the argument the point was not pressed. The King's Bench Division granted the motion for final judgment for possession, and the appeal was by the defendant from that order.

Bartley, for the appellant:—

The notice to quit was given in pursuance of clause 4 of the agreement, and is founded on the happening of an event wholly beyond the control of the defendant, the tenant. The writ cannot be specially indorsed under Order 3, rule 6 (F), as the case is not within the meaning of the words, "whose term has expired or has been duly determined by notice to quit": *Arden*

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STOKES *v.* TRACEY.

v. *Boyce* (1); *Burns* v. *Walford* (2). Order 3, rule 6, is similar to the English Order, under which the foregoing cases were decided.

The words of rule 6 (F) of Order 3 are substantially similar to those of sect. 213 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), which re-enacted 1 Geo. 4, c. 87, sect. 1. Both these Acts refer to tenancies determined by "regular notice to quit." It was, therefore, held that a tenant who had surrendered his term, but refused to quit the premises, could not be proceeded against under sect. 1 of 1 Geo. 4, c. 87: *Doe d., Tindal* v. *Roe* (3). "Any decision upon the language of the previous Acts ought to be regarded as applicable to the provisions of this rule. The decisions upon the Act of Geo. 4 are to the effect that the provisions of the Act did not apply to the case of a determination of a tenancy by forfeiture": per Lord Esher M.R. in *Arden* v. *Boyce* (4). Sect. 75 of Deasy's Act corresponds closely with sect. 213 of the Common Law Procedure Act, 1852, and sect. 1 of the Act of Geo. 4, and it also uses the words "regular notice to quit." It has been held that sect. 75 of Deasy's Act applies only where the tenant's interest has absolutely determined, and not to a case of alleged forfeiture for breach of covenant: *King* v. *Williams* (5). In other statutes the words are "legal notice to quit," and it has been decided that these words must be taken to mean the notice to quit required by law, and not one depending on the express stipulation of the parties: *Friend* v. *Shaw* (6).

There are a number of Irish cases, including *Gleeson* v. *Keown* (7), in which *Arden* v. *Boyce* (1) has been followed.

Best K.C. (with him *J. H. S. Russell*), for the respondent:—

We submit that this case is within Order 3, rule 6. Under the condition in the agreement the plaintiff was entitled to determine the tenancy; and it was duly determined by notice to quit. *Arden* v. *Boyce* (1) is distinguishable on the ground that the action for the recovery of premises there was based on forfeiture. There has been no forfeiture in this case. In *Gleeson* v. *Keown* (1) there was in effect a forfeiture.

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(1) [1894] 1 Q. B. 796.

(2) [1884] W. N. 31.

(3) 2 B. & Ad. 922.

(4) [1894] 1 Q. B., at pp. 798-9.

(5) 16 I. C. L. R. App. 6.

(6) 20 Q. B. D. 374.

(7) 32 I. L. T. R. 150.

Sir James Campbell C.:—

We are all of opinion that it is impossible to distinguish this case either in law or facts from *Arden* v. *Boyce* (2) in the Court of Appeal, England, and *Gleeson* v. *Keown* (1), a decision of this Court. Speaking for myself, if it were a matter of first impression, unfettered by these decisions, I should have found the greatest possible difficulty in deciding against Mr. Best's client, because the case appears to me to be within the express language of Order 3, rule 6; and, further, the defendant has no defence. All these considerations were, I am sure, pressed upon the Judges in the English case and the case in this Court; but, nevertheless, they decided in accordance with the practice antecedent to the Judicature Act, that the summary process did not apply to any case in which the determination of the tenant's interest was due to some matter dependent upon the contractual relations between the parties, and was not the result of the ordinary obligation of the law, e.g., an implied obligation on either party to terminate the tenancy by a definite period of notice, as in the case of a yearly tenancy, where either party could, in the absence of agreement, determine the tenancy by six months' notice, referred to in one of the statutes as "regular," and in another as "legal" notice. I cannot understand on what principle those decisions were arrived at, except on the basis contended for by Mr. Bartley, namely, that Order 3, rule 6, was confined to cases to which, under the former and earlier practice, summary procedure applied; that is, cases in which the determination of the tenancy was due to the legal consequences of the contract, and not to any express agreement between the parties. That distinction does not commend itself to my judgment, because I should have thought the intention of the Legislature was to extend the remedy, and that any case within the precise language of the clause would be

(1) 32 I. L. T. R. 150.

(2) [1894] 1 Q. B. 796.

within it for the purpose of obtaining final judgment; but we are precluded from all this interesting discussion, not only by the comity of Courts, so far as the English Court of Appeal is concerned, but by the decision of this Court itself. We shall allow the appeal.

RONAN L.J.:—

I concur. It seems to me that the question in the case is whether it comes within the words: "A tenant whose term has expired, or has been duly determined by notice to quit" in Order 3, rule 6. Similar words are to be found in the old statutes. In one of them the words are "regular notice to quit," while in the other the phrase is "legal notice to quit." As I understand *Arden* v. *Boyce* (1), the Court decided that the rule applied only to tenancies that were formerly determined by a "regular" or "legal" notice to quit. The real ground of the decision becomes apparent when we come to consider the word "forfeiture." In England there is no statutory enactment giving a right, corresponding to that contained in Deasy's Act, of ejectment for non-payment of rent. Such a right only arises under a condition of re-entry. In England the old forms of leases contained a series of covenants, with a sweeping proviso, that in the event of the breach of any of them the landlord might re-enter. That has been construed as giving the landlord an option to re-enter, if he likes, notwithstanding the words that "the term shall absolutely determine." Whether there is a condition of re-entry for breach of covenant by the tenant, or an express proviso that the landlord may re-enter, say when an eldest son marries, on the breach of covenant, or the happening of the event, the tenancy may be determined, and the landlord forfeits the tenant's interest for his own benefit. The proviso may or may not require a certain notice. The landlord may go straight in, or give notice of intention to do so, according to the terms of the proviso. One is as much a forfeiture as the other. Where there is only an option on the happening of a certain event it is not in the power of the landlord to say at any moment, "I will serve notice to quit," until the event has happened.

(1) [1894] 1 Q. B. 796.

Where he has that power only on the happening of the event, the case does not come within the rule; and I limit my decision to cases in which the landlord is not free to serve notice to quit at any time he likes, and hold that the rule applies only when he is at liberty to serve notice when he likes, independently of any contingency.

O'CONNOR L.J.:—

I concur. I think we are bound by the decisions that have been cited, which establish that the words, "duly determined by notice to quit," mean determined in the ordinary way, that is to say, where a landlord, by the passing of time, is entitled under the contract of tenancy to serve the notice. The rule does not apply where the right to serve the notice depends on the happening of a contingency, as in this case.

Solicitor for the appellant: *E. McHugh.*
Solicitor for the respondent: *Wm. V. Seddall.*

C. L.

K. B. Div.
1919.
Nov. 4, 5.
—
Appeal.
1920.
Feb. 10, 11.
May 4, 10.
June 29.

WILLIAM PEDLAR, PLAINTIFF, v. LIEUT.-COLONEL W. EDGEWORTH JOHNSTONE, DEFENDANT.

Alien—Friendly or enemy—Citizen of friendly State personally hostile to Crown—Seizure of alien's property by Crown—Ratification—Act of State—Right of alien to hold and recover property within the Realm.

The plaintiff, formerly an Irishman, became a naturalized American citizen; he returned to Ireland in 1916, where he took an active part against the Crown, in the rebellion of Easter, 1916, after which he was arrested and imprisoned. On his release he took part in illegal drilling, and was re-arrested in Ireland in May, 1918, when a sum of money was found upon him, which was taken and detained by the police authorities, the seizure and detention being subsequently ratified by the Chief Secretary for Ireland. In an action by the plaintiff against the Chief Commissioner of the Police for the recovery of the money:

Held, by the majority of the Court of Appeal (Ronan and O'Connor L.JJ., O'Connor M.R. dissent.), reversing the decision of the King's Bench Division, that the plaintiff, although personally hostile to the Crown, had all the rights of a friendly alien, including the right to hold personal property within the realm, and to sue for its recovery if wrongfully deprived of its use; and that the plaintiff was entitled to judgment in the action.

ACTION.

The plaintiff, by his statement of claim, alleged that the defendant had detained from the plaintiff the sum of £124 cash, and a cheque for £4 15*s.* 6*d.*, payable to the plaintiff, both the property of the plaintiff, and refused to deliver up the same to the plaintiff; and the plaintiff claimed a return of the said money and cheque, with £10 damages for their detention, or alternatively £138 15*s.* 6*d.* damages for conversion.

The defendant, by his defence, after traversing the alleged causes of action, pleaded that the moneys and cheque were the property of an illegal association, and were in the plaintiff's possession for the illegal purposes of such association at the time of the acts complained of; that the plaintiff was an alien, and that the moneys and cheque were taken and detained by an officer of the Crown by the direction of the Crown as an act of State for the defence of the realm, and for the prevention of crime.

The action was tried before the Right Honourable Mr. Justice Pim and a common jury of the City of Dublin, on 3rd July, 1919, and the following summary of the evidence is taken from the learned Judge's report of the trial of the action.

The plaintiff deposed as follows:—

I was born in Ireland. I left it when very young. I went to Glasgow, and then to America. I was naturalized a citizen of the United States in January, 1916. (The certificate of naturalization was here put in.) I came back to Scotland in March of 1916. From there I came over to Ireland. I took part in the Rebellion of 1916 in Dublin. I was afterwards in Frongoch. I was released about Christmas, 1916, and I came back to Ireland about March, 1917. I was again deported to Oxford. I was released in May, 1917, and returned to Ireland. I was arrested on 1st May, 1918, on a charge of illegal drilling. I was sentenced to four months' imprisonment, and a further two months in default of giving bail. I remained in gaol the whole six months. After that a new deportation order was made against me. I had in my possession at the time of my arrest £129 in cash or notes, and a cheque for £4 15*s.* 6*d.*; this was all taken by the police. I think it was Inspector Boyle who took the money. I served my sentence in Belfast Gaol. I instructed my solicitor to write to the Chief Commissioner of Police asking for the money. I received some letters in reply. (The letters written by the plaintiff's solicitor, and the replies thereto, are all in evidence.) I have got back none of the money. I was a member of the Clan-na-Gael. The money did not belong to that or to any organization. £100 was a grant or loan made to me by the National Aid Association. This Association was an organization for assisting those who had taken part in, or were victimized for the part they had taken in the Rebellion of 1916. The grant was made to me by cheque in December, 1917. I cashed the cheque in March, 1918. I got in exchange a note for £100. This note was taken by the police. I carried on the business of wholesale stationer as agent for several firms from September, 1917. The sum of £29 represents profits made from sales up to March 31st, 1918. I used to buy from wholesale dealers, and sell to small traders in the city. From the 1st April, 1918, to 1st May, 1918, I was acting as manager of the Art Depôt, No. 6 Mary Street. My salary was £2 10*s.* a week and commission on certain books. I was also allowed to sell stationery. It was in this way that the £29 was made. (During the progress of the suit it was admitted by the plaintiff that he could only claim £24 of this £29.) The cheque for £4 15*s.* I received from Miss O'Rahilly. I stopped this cheque, and was afterwards paid in cash. I never got any money from any organization as alleged.

Cross-examined—I lived in Philadelphia. I came to Ireland as the representative of the Irish Industrial Development Company. I landed in Dublin on the 12th or 15th April, 1916. I came to Dublin to make arrangements for bringing over my wife, and she afterwards came. On Monday, 24th April, I saw the commotion in the streets, and I went into the Post Office. No one had told me about it beforehand. I was not an officer. I got arms in the Post Office. I was a member of the Volunteers. I was not engaged in arming people. I probably advised them to arm themselves. I went to Dean's Grange to drill some men. Gascoyne was there. I did not say they were to come to drill the next day, nor did I hear anyone say so. I advised them all to have bicycles. I did say that they might be able to get arms; that there were chances. I said nothing about raiding. I told Gascoyne to carry on. I meant drilling.

This concluded the plaintiff's case.

The only evidence adduced on behalf of the defendant was that of Dr. Wynne, the Chief Crown Solicitor, who proved the signature of the Chief Secretary to the following document, which was entitled in the present action:—

"It appearing that Richard H. Boyle, Inspector of the Dublin Metropolitan Police, on the 1st May, 1918, arrested one William Pedlar (an alien), at Blackrock, Co. Dublin, on a warrant dated the 1st May, 1918, signed by Mr. Swifte K.C., Divisional Justice, for an offence under the Defence of the Realm Act, and that the said Inspector Boyle searched the said William Pedlar after his arrest, and that there were found upon him (inter alia) the sum of £124 cash, and a cheque for £4 15*s.* 6*d.*, both of which were taken and detained by an officer of the Crown (who still retains same) as an act of State for the defence of the realm, and for the prevention of crime. Now, I, the Right Honourable Ian MacPherson, M.P., Chief Secretary for Ireland, in my capacity as a Minister of the Crown, and Officer of State, and official superior of the said officer, do here formally ratify, adopt, and confirm the said seizure of the said cash and cheque, and the detention of same by the officer, on the grounds aforesaid.—Dated this 19th day of June, 1919. Signed, Ian MacPherson. Witness, Henry Arthur Wynne."

The learned Judge directed the jury to find for the defendant, but left to them a question as to the ownership of the property, in answer to which the jury found in favour of the plaintiff as to £24, but disagreed as to the balance of the claim.

R. ST. J. C.

Nov. 4, 5.

The plaintiff applied to the King's Bench Division (1) for judgment for the sum of £24 and costs, and for a new trial as to the balance of his claim; or alternatively for a new trial of the entire action.

Healy K.C. and *J. O'Byrne*, for the plaintiff.

Serjeant Sullivan K.C., *Serjeant M'Sweeney K.C.* (with them *Cecil Fforde*), for the defendant.

The arguments were similar to those in the Court of Appeal. The authorities cited are referred to in the judgments.

DODD J.:—

Nov. 5.

We do not think it necessary to defer our judgment in this matter, and we will proceed to deal with it at once. As to many of the matters gone into during the arguments, e.g., matters appertaining to International Equity, to the comity of nations, and as to the possible results of the action of the Executive in this matter, we say nothing. They are matters outside our jurisdiction. In this case they are matters for the Executive; and if the Executive thinks it was justified in doing what it has done, it is for it, if it thinks fit, to justify its action to any friendly power. Far be it from me to suggest that the Executive was not justified in what it has done in the present case. But that is not for us.

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(1) In the King's Bench Division, before DODD, GORDON, and MOORE JJ.

The plaintiff here sets out that he came to Ireland and engaged in the Rebellion of 1916, was in the Post Office when it was destroyed, and that he spent some time in Frongoch. He was again arrested in May, 1918, on a charge of illegal drilling. When arrested a sum of £129 in cash or notes was found on him, and a small cheque for £4 15*s.* 6*d.* The Executive take that from him. If one of their own subjects were engaged in the way the plaintiff here was, he would have been dealt with in a different manner. The Executive keep the money, and prevent its being used against the King; and if a friendly nation represent that the money ought to be returned to their citizen—the man who destroyed our Post Office, upset the peaceful government of the country, and caused rebellion and commotion amongst its inhabitants, and, if not, it is a cause of war—well, with that we have nothing to do.

What we have to consider is, has this man any right to sue the King's officer? And how can we say he has? On the authorities the case is clear that he has not. They are all set forth in the book to which Mr. Healy has referred us, "Robertson's Civil Proceedings by or against the Crown." It says, at p. 638 of the 1908 edition: "A servant of the Crown cannot rely on the authority of the Crown as a defence to a wrongful act done to a fellow-subject"; and it gives the authorities on which that statement of the law rests. The learned author then goes on: "The words 'done to a fellow-subject' in the proposition are added on account of the case of *Buron* v. *Denman* (1), which shows that the proposition does not extend outside a purely domestic forum." The only way that case of *Buron* v. *Denman* (1) is sought by Mr. O'Byrne to be distinguished is that there is a difference between an act done outside the jurisdiction and one done within it. I should have thought the act done within the jurisdiction would be a fortiori. But that was not the ground of the decision.

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(1) [1848] 2 Ex. 167.

The case of *Buron* v. *Denman* (1) does not stand by itself. It has been a leading authority since 1848, and has been put forward as acknowledged law in Mr. Robertson's book, which is a book of great authority itself. The decision in that case has also received the judicial consideration of Cockburn C.J., a very able Judge, one of the finest we ever had; and in *Feather* v. *R.* (2) that learned Judge says: "The fact that it was a case at Nisi Prius does not detract from the weight of that learned Judge's observations, that the case of *Buron* v. *Denman* (1) . . . only shows that where an act injurious to a foreigner, and which might otherwise afford a ground of action, is done by a British subject, and the act is adopted by the Government of this country, it becomes an act of the State, and the private right of action becomes merged in the international question which arises between our Government and that of the foreigner. The decision leaves the question as to the right of action between subject and subject wholly untouched." The whole bent of that learned Judge's mind was in favour of the public as against prerogative; but he recognizes that in such a case the private right of action is a right as between the subjects of the Crown.

Authority does not rest there. There is the Scotch case of *Poll* v. *The Lord Advocate* (3). In the year 1897, at a time when there existed friendly relations between this country and Germany, Ernest Otto Poll, a German subject and master of steam-trawler "Alster," presented note of suspension and interdict against the Lord Advocate, as representing Her Majesty, and against Armytage Lucas, R.N., Commander H.M.S. "Jackal," and William Couper, Fishery Board Officer, Aberdeen. The acts complained of were as follows:—That the master of said "Alster" had trawled outside the 3-mile limit, but within the area forbidden by Herring Fishery (Scotland) Act, 1889 (52 & 53 Vict. c. 23), sect. 7, and that he attempted to land his cargo of fish at Aberdeen, but was twice prevented by Lucas and Couper, who

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(1) [1848] 2 Ex. 167.

(2) [1865] 6 B. & S. 257.

(3) 1 Fraser, 823.

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alleged they were acting under instructions and authority of H. M. Secretary of State for Scotland.

Respondents admitted that they prevented complainant from landing fish. They referred to sect. 7 of Herring Fishery Act and bye-law made under it. Finally, they averred: "The Secretary for Scotland is a member of Her Majesty's Government. The said Government resolved in the interests of the State, and as an act of State, that the fish in question . . . should not be allowed to be landed in Scotland; and, acting on this resolution, and instructed to that effect by Her Majesty's Government, and in concert with Her Majesty's Advocate, the Secretary for Scotland ordered the said respondents Lucas and Couper to prevent the landing of the said fish. The respondents Lucas and Couper in acting as they did were obeying, as they were bound to do, special orders given them by the Secretary for Scotland on behalf of Her Majesty and Her Majesty's Government, and the respondent, Her Majesty's Advocate, was aware of and concurred in said orders being given." To this part of the averment it was answered by complainer: "Not known and not admitted. If instructions were given by the Secretary of Scotland as alleged, which is not admitted, that was done as part of the routine work of the Department, and under the erroneous belief that the acts instructed were authorized by the Acts of Parliament and bye-law founded thereon." The respondents pleaded, inter alia: "The act complained of was, and is, an act of State by and on behalf of, and by command of, Her Majesty and Her Majesty's Government, and no action lies in this country at the suit of a foreigner, either against the Crown or the servants of the Crown, in respect of such act."

The Lord Ordinary (Kyllachy), in the course of his judgment, said: "But let it be taken that the thing done is (though done to an alien) contrary to municipal law. Assume, for example (because it is said to be the case here), that by a British statute it is expressed or implied that all foreign fishermen shall have free and unqualified access to British territory, it has still to be asked by what right can a foreigner plead that or any limitation of the Royal prerogative? British subjects may do so; for the laws and usages which form our constitution have been established for their benefit. But if they acquiesce, on what principle can foreigners object? The truth is that, except in a question with its own subjects, the sovereign power—the supreme executive—of every State must be held to be absolute. Its acts are, till disavowed, the acts of the State, and must be treated as such. An alien, or at least a friendly alien, is allowed by our customs (as by those of most civilized States) to sue in our Courts actions against private individuals. But he cannot sue the State, or the head of the State; at least he cannot do so in respect of wrong done or threatened in the national interest. Whether, and under what limitations, he may be permitted to sue upon contracts made between this State and him as an individual is a question which it is not here necessary to consider."

And in another part: "As to the necessity of proof, I may state my opinion very shortly. I do not inquire whether it is open to the complainer (who is an alien, though a friendly alien) to raise and try the question whether Messrs. Lucas and Couper, admittedly acting, not in their private capacities, but officially, were duly authorized by their official superiors, and whether these again were duly authorized by the head of the State. There is weighty authority in the negation—*Musgrave* v. *Chun Teeong Toy* (1)—as to which I am not to be held to be expressing any doubt. But it seems to me to be here enough to foreclose any inquiry that Her Majesty by her Advocate appears in the process, and states to the Court that the act complained of was duly authorized, and was in fact done by Her Majesty's orders. . . . It is indeed, in my opinion, enough that Her Majesty appears by her Advocate and adopts and ratifies the act of her officers."

I have set this decision of the Scottish Court out at length, as the Scottish law being different from the law in England and Ireland, practitioners in this country have not such access to the decision of the Scottish Courts as to those under our law. The Royal prerogative, however, does not vary in the three kingdoms, and out of comity to the Court in Scotland we follow the decision on a matter affecting the Royal prerogative. We follow it also on the minor point raised, that there was no antecedent command. Both in *Buron* v. *Denman* (2) and in *Poll* v. *Lord Advocate* (3) this is also determined. Subsequent ratification is equivalent to antecedent authority. We follow, therefore, the law as laid down in the Courts of the other parts of the United Kingdom on both.

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(1) [1891] A. C. 272. (2) [1848] 2 Ex. 167. (3) 1 Fraser, 823.

Then we have the case of *Phillips* v. *Eyre* (1). That was an action against the Governor of the Island of Jamaica for false imprisonment and other injuries to the plaintiff. The defendant pleaded that he was governor; that a rebellion broke out and was suppressed by him and others acting under his authority; and that an Act of Indemnity had been passed. The case itself does not directly bear on the present case; but, in the course of the judgment, that great Judge, Willes J., goes out of the way to comment on and adopt the law as laid down in *Buron* v. *Denman* (2).

Mr. Healy and Mr. O'Byrne have referred us to the statutes conferring rights on aliens. These statutes are concerned with internal government, and with matters between subjects. They do not apply here. The King is not bound. Poll was not bound by our internal laws, but he had no rights against the King.

I have been speaking only of procedure. If the plaintiff had been a subject of the King, the defendant would have been obliged to justify what he did, and satisfy a jury of his countrymen that his action was within his authority, to be supported on grounds arising from ordinary municipal jurisprudence. The justification to be given in this case is not to a jury of his countrymen, but to the representative of his State. If complaint has been made that the King has done an unfriendly act to a citizen of another State, the reply would probably be that the citizen of the other State was engaged in an unfriendly act against His Majesty.

GORDON J.:—

I concur. In this case we have given the defendant simply the law. But I wish to add that the plaintiff is entitled to no special consideration at our hands. We have given him as much consideration as if he were a British subject.

MOORE J.:—I also concur.

H. J. M'C.

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(1) L. R. 6 Q. B. 1.

(2) [1848] 2 Ex. 167.

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The plaintiff appealed to the Court of Appeal.

Healy K.C. and *J. O'Byrne*, for the appellant, contended that the plaintiff was entitled to judgment for the full amount of his claim. Although personally hostile to the Crown, he, being a subject of a friendly country, had all the rights of a friendly alien, including the right by statute to hold and enjoy personal property within the realm. The alleged ratification by the Crown did not affect the issue, as an illegal act cannot be the subject-matter of valid ratification.

Serjeant Sullivan K.C. and *Serjeant M'Sweeny K.C.* (*Cecil Fforde K.C.* and *H. Holmes* with them), for the respondent:—

The seizure and detention of the money in question were acts of State, duly ratified as such, and done for the defence of the realm. If a subject, the plaintiff could not recover in an action at law. He is, however, an alien, and has shown conclusively, by his overt acts, that he is an enemy alien, who has no right to sue in the King's Courts.

[The authorities and statutes cited and referred to appear, and are fully dealt with, in the judgments of the Court of Appeal.]

O'Connor M.R. :—

The main point made by counsel for the appellant was that, as a friendly alien, he was competent to maintain the action. Let us see then how his claim for the status of a friendly alien is sought to be established.

He is a naturalized citizen of the United States of America, a friendly power. He came to Scotland, and thence to Ireland in the year 1916, and took part in the Rebellion of that year against the authority of the Crown. He was imprisoned and released. He afterwards took part in illegal drilling, which presumably had no other object than the promotion of another rebellion. For this he was arrested and convicted. It was on his arrest that the acts complained of were committed.

Notwithstanding his career of personal hostility to the British Crown while within the King's dominions, it is claimed for him that he must be treated in the King's Court as a friendly alien, and given all the rights and privileges of a British subject because he is the subject of a friendly power. The claim is, on the face of it, fantastic; but, as it has been seriously made, it deserves consideration.

It is said that, according to the Common Law, the subject of a friendly State, when resident in the King's dominions, was entitled to hold personal property, and to maintain personal actions in the King's Courts. This may be true as a general proposition, but it is by no means free from doubt. No one can read the illuminating chapter on aliens in Sir. F. Pollock's and Professor Maitland's great work without seeing that the subject is involved in obscurity and uncertainty. The alien merchant of a friendly State could hire a house and acquire goods and chattels, and sue in respect of them, but this may have been a matter of privilege rather than of absolute right. The eminent text-writers say :—"Also it is said that an alien may have goods and chattels; he may make a will of them, and, should he die intestate, they will be administered for the benefit of his kinsfolk. But it is very noticeable that according to Littleton an alien can bring no action whether real or personal, and when his great commentator explains this to mean that no alien can bring a real action, that no alien enemy can bring a personal action, but that an alien whose Sovereign is in league with our own may bring personal actions, we cannot but feel that this is a bold treatment of a carefully worded text" (2nd ed., p. 459).

Later on the text-writers say :—"Littleton's bold assertion that an alien can bring no action real or personal may be less open to exception than his commentator supposed, for in Littleton's day we hear that the proper Court for aliens who have come here under the King's safe conduct is the Court of Chancery; 'they are not bound to sue according to the law of the land, nor to abide the trial by twelve men and other solemnities of the law of the land, but shall sue in the Chancery and the matter shall be determined by the law of nature'" (2nd ed., pp. 465–6).

Therefore, according to Littleton, friendly aliens, though privileged to sue, were outside the Common Law. The Common Law on the subject is therefore, to say the least, obscure, but Coke may be regarded as its exponent most favourable to the claim of aliens to come within it. Indeed, Sir E. Pollock and

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Professor Maitland consider that he strained the construction of the Littleton text in order to give them rights which they really had not. I am bound, however, to say that Coke is supported by other eminent text-writers. But adopting the law as expounded by Coke, we find that he has stated his reasons for giving to the friendly alien resident in England the right of action which is vested in the English subject. The reasoning is to be found in the report of *Calvin's Case* (1). He says that there are four kinds of allegiance—ligeances—one being local allegiance, which he deals with in this way: "The third is, ligeantia localis, wrought by the law, and that is when an alien that is in amity cometh into England, because as long as he is within England, he is within the King's protection; therefore so long as he is here he oweth unto the King a local obedience or ligeance, for that the one (as it hath been said) draweth the other." I understand this as meaning that one is the consideration for the other, and that if the consideration of obedience fails, the right to protection is gone. There is a mutuality in the obligations. Protectio trahit subjectionem, et subjectio protectionem, is the maxim quoted by Coke, and this must govern the relationship between the King and the individual alien, and not between the King and the foreign State whose subject the resident alien is. Social allegiance, which gives the right to the King's protection, must of necessity be the allegiance of the individual, and if the latter refuse it, he has no claim to the rights or privileges which flow from it.

This is the principle which I conceive to be at the root of the Common Law, which, as it came to be expounded by Coke, Blackstone, Halsbury, and others, gave friendly aliens living within the Kingdom a right of action in respect of personal property. If this principle is to be applied to the present case, the repudiation by the plaintiff of all allegiance affords an answer to his claim under the Common Law. No doubt, as time went on, and as intercourse with the outer world increased, there was manifested a disposition to extend the rights of aliens. For instance, in a case in Dyer 2 b, an alien living in France brought a writ of debt, and the defendant pleaded that he was out of the allegiance of the King. It was held that the plea was bad, because, although an alien, he was entitled to bring all personal actions, there being no war between England and the realm to which he belonged.

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(1) 7 Coke, *5b*.

Again, in 1839, it was decided that an alien resident abroad could bring an action for libel in the English Court: *Pisani* v. *Lawson* (1); but I do not think that the learned Judges felt that they were on very firm ground, because it is noticeable that two members of the Court mention as a material circumstance that the plaintiff, although an alien, was in the employment of the British Government. Further, I think that as an authority the judgment in that case of Tindal C.J. is weakened by his reliance on *Tirlot* v. *Morris* (2), a case in Bulstrode, which he quoted in support of the view that an alien residing out of the jurisdiction could bring an action for libel, although, as pointed out by the defendant's counsel, the report did not show that the plaintiff in *Tirlot* v. *Morris* (2) was resident abroad. Indeed, on reading the case, I think that the fair inference is that he was within the jurisdiction. These cases, however, show that the law in favour of aliens was extended so as to make the right of action independent of local allegiance involving residence within the Kingdom; but I can find no case which supports the view that when an alien is within the Kingdom, and has the opportunity of giving the kind of allegiance designated by Coke as local allegiance in return for the protection of the King, he can repudiate the one and claim the other.

I must now deal with modern legislation, in order to see whether that part of the Common Law which only gave the friendly alien resident within the Kingdom the right to sue in the King's Court as a return for his allegiance—which I hold to be an essential condition to the exercise of the right, and to be the fundamental reason for the Common Law—has been abrogated by statute. It is clear that the Common Law must give way to an Act of Parliament, but it is equally clear that if the Common Law is annulled it must be by the unmistakably expressed intention of the Legislature. It must appear that one is repugnant to the other. If the two can be reconciled, the Common Law must remain; and it is a good rule of construction to construe a statute

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(1) 6 Bing. N. C. 90.

(2) Bulstrode, Pt. 1, p. 134.

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in conformity with the Common Law rather than against it, except when and so far as the statute is plainly intended to alter the Common Law: *Reg.* v. *Morris* (1); *Reg.* v. *Scott* (2).

I need only refer to the British Nationality and Status of Aliens Act, 1914, which enacts that real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural born British subject. It is to be observed that there is no right of action expressly given, but it may be said to be implied. Now, if the right of action is only got by implication, why should not that be subject to the Common Law that made the right of a resident alien to enter the King's Court conditional on allegiance? But I do not think that any right of action is given by implication of the statute, because it contains a proviso that it shall not operate so as to entitle an alien to any right or privilege as a British subject except such rights and privileges in respect of property as are thereby expressly given to him. No doubt, the alien who acquires property under the statute has a right of action, but he does not get that from the statute, but from the Common Law, which enables every subject to recover or defend his property by action in the King's Court.

Therefore, I can see no insuperable difficulty in the way of reconciling the Common and Statute Law in the matter, while I would have had the utmost difficulty in persuading myself that it was the intention of the Legislature to authorize an alien who had come into this country to help to raise a rebellion, and actually took part in it, in order to subvert the King's Court, to invoke its protection.

This right is claimed on the ground that the plaintiff is to be regarded as a friendly alien—a claim based on the mere fact that he was the subject of a friendly State. But that is not the sole test. The subject of a friendly State may in certain circumstances be treated as an alien enemy. For instance, if he carries on trade in an enemy country, he is treated as an enemy when he comes to enforce civil rights in the King's Court, as demonstrated by Lord Reading in his judgment in *Porter* v. *Freudenberg* (3),

(1) [1867] L. R. 1 C. C. R. 90.

(2) 25 L. J. M. C. 128.

(3) [1915] 1 K. B. 857, at pp. 867-868.

and the reason for that is this: that by trading in the enemy country he gives help to the enemy. How much more strongly does this reason apply to an alien who, when war is raging with an enemy country, comes into the kingdom to upset the King's Government? I refuse to treat the plaintiff in this action, who seeks to enforce civil rights, as an alien friend. I treat him, as he in fact was, as an alien enemy, and, in my opinion, his action ought to be dismissed.

RONAN L.J.:—

By the Common Law the King had the right to seize and forfeit the goods found in the Kingdom belonging to alien enemies. As I understand the judgment of the King's Bench Division in this case, it decided—1, that this right equally existed, and still exists, in respect of the goods of alien friends; 2, that this right is not taken away by any of the Naturalization Acts, as these Acts do not bind the Crown or affect the prerogative.

These are grave questions of Constitutional Law. The only branch of the prerogative they are concerned with is the right to take within the realm the goods of an alien friend living and being at the time within the realm. The question mainly, almost exclusively, argued in this case was whether the fourth paragraph of the defence afforded an answer to the action. The Judges in the King's Bench Division held that it did, and that the case of *Buron* v. *Denman* (1) governed the present case. That case decided that ratification by the Crown related back, and was equivalent to a prior command. Early in the argument I asked had it ever been held, or even suggested, that the King had power to seize and forfeit the personal chattels of a friendly alien residing in this country. We were referred to no case or book in which it was either held or suggested that he had. It is obvious that if the King had not this power the alleged ratification could have no effect.

The defence is "act of State" proved by ratification. Let us first clear up the meaning of "act of State." I take Sir F. Pollock's account from the 10th (1916) edition of his work on Torts,

(1) [1848] 2 Ex. 167.

p. 117:—"It is by no means easy to say what an act of State is, though the term is not of unfrequent occurrence. On the whole it appears to signify—1, An act done or adopted by the prince or rulers of a foreign independent State in their political and sovereign capacity, and within the limits of their de facto political sovereignty; 2, more particularly (in the words of Sir James Stephen) (*b*) 'an act injurious to the person or to the property of some person who is not at the time of that act a subject (*c*) of [his] Majesty; which act is done by any representative of [his] Majesty's authority, civil or military, and is either previously sanctioned or subsequently ratified by [his] Majesty.'"

"(*c*) [*Note.*—This includes aliens living in 'temporary allegiance' under the protection of English law; therefore an act of state in this sense cannot take place in England in time of peace, and not easily in time of war, for it seems that an alien enemy resident here with licence is under the same protection: *Porter* v. *Freudenberg, &c.* [1915] 1 K. B. 857."]

It is obvious that if this statement, including the Note (*c*), is correct, it is conclusive as to the invalidity of the defence in paragraph 4 in the present case. In my opinion the statement and note are fully justified by the authorities; and there are no authorities referred to which are in conflict with them. The case referred to(1) was argued most elaborately for four days, concluding on the 7th December, 1914, before the full Court of Appeal, consisting of Lord Reading C.J., Lord Cozens-Hardy M.R., and Buckley, Kennedy, Swinfen Eady, Phillimore, and Pickford L.JJ. Judgment was reserved until the 19th January, 1915, when the unanimous judgment of the seven Judges was delivered by the Lord Chief Justice. At p. 869 the judgment deals with the rights of aliens, and states the law as follows:—"In ascertaining the rights of aliens the first point for consideration is whether they are alien friends or alien enemies. Alien friends have long since been, and are at the present day, treated in reference to civil rights as if they were British subjects, and are entitled to the enjoyment of all personal rights of a citizen, including the right to sue in the King's Courts. Alien enemies have no civil rights or privileges unless they are here under the protection and

(1) [1915] 1 K. B. 857.

by permission of the Crown: Blackstone, 21st ed., vol. i, c. 10, p. 372. Indeed, under the ancient Common Law, 'debts and goods found in this realm belonging to alien enemies belong to the King, and may be seized by him': see Hale's Pleas of the Crown, vol. i, p. 95. That the enemy's property was liable to confiscation is also shown by the privilege granted under c. 30 of Magna Charta to merchant strangers coming into this realm, whereby the privilege was conceded to merchants of a land making war against the Sovereign and found in this realm that they should be attached without harm of body or *goods* until it became known how English merchants were treated in the hostile State. If well treated, the enemy merchants were to be well treated here, so that confiscation of the enemy merchants' property would only occur by way of reprisal or retaliation. Whether the right of the Sovereign to confiscate any of the alien enemies' goods or debts in this realm was ever exercised or not (see *Wolff* v. *Oxholm* (1), per Lord Ellenborough), there can be no doubt about the existence of the right: see *Attorney-General* v. *Weeden* (2). Gibbs C.J. in *Antoine* v. *Morshead* (3) affirmed the principle that the Crown during the war may lay hands on debts due to the alien enemy, but if it do not, then on the return of peace the rights of the contracting alien are restored and he may himself sue to recover the debts: see also Walford's Parties to Action (mentioned later herein), at p. 653, and the authorities there cited from 19 Edw. 4, to *Antoine* v. *Morshead* (3). The right of confiscation is only of importance to trace the history and foundation of our Common Law, since there is manifestly no question of exercising this right."

The last sentence is remarkable; for in the present case the right of confiscation is not only claimed, but has been exercised by the Crown, and not of the goods of an alien enemy, but of a resident alien friend. It is obvious that the seven Judges were of opinion that the distinction between the alien friend and the alien enemy was that the goods of the latter were subject to confiscation. The judgment is wholly inconsistent with the right claimed here to confiscate the goods of a friendly alien. I referred

(1) [1817] 6 M. & S. 92, at p. 102.
(2) [1699] Parker, 267.
(3) [1815] 6 Taunt. 237.

to this passage in Pollock, and the case mentioned on the first argument of the present case, and actually handed down my own copy of Pollock to respondent's counsel. I referred to the matter again at the second argument, but there was no attempt to deal with the matter. I may add that, in 1912, Sir John Macdonell, in the 23rd volume of Lord Halsbury's Laws of England, at p. 309, submitted that the law is as stated in Sir F. Pollock's note [His Lordship read article 646, note (*f*), on p. 309, and continued:—] These were referred to at the trial. However, as three Judges of the King's Bench Division have now apparently decided that the King can, at his pleasure, order the goods of a friendly alien, resident within the realm, to be taken from him and forfeited, we must carefully examine the authorities before we venture to differ from them on a question of such importance. It is admitted that this cannot be done in the case of natural-born subjects. They are at one end of the class of "subjects." Then come the naturalized subjects by statute, denizens, and lastly alien friends resident in the Kingdom. If by our laws and constitution the rights of friendly resident aliens to personal chattels are the same as those of natural-born subjects, it follows that the decision of the Court below is wrong. It will be observed that the limitation of the rights of aliens to property referred to it is always the right of the King to seize and take it from him. I take the following statements of the law:—Vol. i, Lord Halsbury's Laws of England, p. 303: "An alien friend is one whose Sovereign or State is at peace with the Sovereign of England"; p. 304, "An alien enemy is one whose Sovereign or State is at war with the Sovereign of England."

The exceptions mentioned in par. 682, p. 310, have no application to this case. As to these definitions, I shall only say that from the time of Lord Coke they appear to me to have been universally accepted. The cases in which a neutral having a commission in the military service of the foreign state at war with England has been dealt with as an alien enemy have no application to the present case. *Calvin's Case* (1) is always referred to as the great authority on this question relating to aliens. The Lord Justice will deal with it. I shall refer to some other authorities.

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(1) 7 Coke, 5*b*

Blackstone deals with the matter by first treating of "the people" and of "allegiance"; this lies at the root of the relations of Crown and subject, and their reciprocal rights and duties. But "Ligeance is reciprocrum ligamen quia sicut subditus tenetur ad obedientiam ita rex tenetur ad protectionem" (1 Comyn's Digest, 554). "It is the duty of the Crown and of every branch of the Executive to abide by and obey the law." See judgment of the Privy Council in *Eastern Trust Company* v. *M'Kenzie, Mann, & Co., Limited* (1). The rights of friendly resident aliens to property are part of the law, which the King and Executive are bound to obey.

Blackstone, Book I, chap. x, says (I quote the 21st edition, 1844): p. 366—"The first and most obvious division of the people is into aliens and natural-born subjects. Natural-born subjects are such as are born within the dominions of the Crown of England; that is, within the ligeance, or, as it is generally called, the allegiance of the King, and aliens, such as are born out of it. Allegiance is the tie, or ligamen, which binds the subject to the King, in return for that protection which the King affords the subject." He then deals with the oaths of allegiance, and proceeds: p. 368—"But, besides these express engagements, the law also holds that there is an implied, original, and virtual allegiance, owing from every subject to his Sovereign, antecedently to any express promise, and although the subject never swore any faith or allegiance in form . . ."

p. 369—"Allegiance, both express and implied, is, however, distinguished by the law into two sorts or species, the one natural, the other local, the former being also perpetual, the latter temporary. Natural allegiance is such as is due from all men born within the King's dominions immediately upon their birth." . . . "Local allegiance is such as is due from an alien or stranger born for so long time as he continues within the King's dominion and protection; and it ceases the instant such stranger transfers himself from this kingdom to another." . . . "As, therefore, the prince is always under a constant tie to protect his natural-born subjects at all times and in all countries, for this reason their allegiance due to him is equally universal and permanent. But, on the other hand, as the prince affords his protection to an alien only during his

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(1) [1915] A. C. 750, at p. 759.

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residence in this realm, the allegiance of an alien is confined (in point of time) to the duration of such his residence, and (in point of locality) to the dominions of the British Empire." . . . p. 371—"This allegiance then, both express and implied, is the duty of all the King's subjects, under the distinctions here laid down, of local and temporary or universal and perpetual. Their rights are also distinguishable by the same criterions of time and locality, natural-born subjects having a great variety of rights which they acquire by being born within the King's ligeance." . . . "The same is also in some degree the case of aliens, though their rights are much more circumscribed, being acquired only by residence here, and lost whenever they remove. I shall, however, here endeavour to chalk out some of the principal lines whereby they are distinguished from natives, descending to further particulars when they come in course." Pages 371–2: "An alien born may purchase lands or other estates: but not for his own use, for the King is thereupon entitled to them." . . . "Yet an alien may acquire a property in goods, money, and other personal estate, . . . for personal estate is of a transitory and moveable nature, and, besides, this indulgence to strangers is necessary for the advancement of trade. Aliens also may trade as freely as other people. . . . Also an alien may bring an action concerning personal property, and may make a will and dispose of his personal estate, not as it is in France, where the King at the death of an alien is entitled to all he is worth. . . . When I mention these rights of an alien I must be understood of alien friends only, or such whose countries are in peace with our's, for alien enemies have no rights, no privileges, unless by the King's special favour during the time of war." These passages are in every edition of Blackstone that I have seen. I take Viner, Ab., vol. ii, 2nd ed.—"Alien friend" (p. 257): "What things he may have without forfeiture to the King. An alien may purchase land, but the King may seize it." Page 273: "An alien friend may by the Common Law have and acquire by gift, trade, or other lawful means any treasure or goods personal whatsoever as well as any Englishman, and may maintain any action for the same." The law will be found stated to the same effect in Bacon's Ab., vol. i, p. 164, and Comyn's Digest, titles "Alien" and "Allegiance." The King can only seize the alien's lands on office found. The inquisition of office applies to goods.

"The 21 Hen. 8, c. 11, says: "That if any person do rob or take away the goods of any of the King's subjects within this realm, and be . . . found guilty thereof . . . by reason of the evidence of the party so robbed, or owner of the . . . goods, then" the party shall be restored to his goods. Hale says (1 Pleas of the Crown, 542): "Tho' the statute speaks of the King's subjects, it extends to aliens robbed, for, though they are not the King's natural-born subjects, they are the King's subjects when in England by local alligeance."

"Alien enemy is a plea in abatement." "Alienage without enmity is no plea in personal actions": 1 Com. Dig., p. 39. "An alien whose Sovereign is in amity with the Crown of England, residing here and receiving the protection of the law oweth a local allegiance to the Crown during the time of his residence. And if, during that time he committeth an offence, which in the case of a natural-born subject would amount to treason, he may be dealt with as a traitor. For his person and personal estate are as much under the protection of the law as the natural-born subject's; and if he is injured in either, he hath the same remedy at law for such injury": Foster's Crown Law, 185.

These authorities seem to me conclusive as to the Common Law on these matters. 1. That the only limit to a friendly alien's right to property, as distinguished from that of a natural-born subject, is its liability to seizure and forfeiture by the Crown. 2. That there is a fundamental difference between an alien's rights in respect of lands and those in respect of chattels, namely, that the former can be forfeited by the King, but only after office found, while the resident friendly alien has the same rights in respect of chattels as the natural-born subject. 3. That the resident friendly alien is a subject so long as he remains in the kingdom, and as to property has the same rights as a natural-born subject, save that his lands were liable to forfeiture on office found.

I have found nothing in any book to throw any doubt on these propositions. Viner, Coke, Comyn, Bacon, Hale, Foster, and Blackstone are a wide range of authorities. It is true that there is no statement that the King cannot seize the goods of a friendly resident alien at his pleasure, but surely such a proposition is wholly irreconcilable with all the authorities I have cited.

There is a case in Parker, p. 267, of *Attorney-General* v. *Weedon* (1), the effect of which is thus stated at p. 174 of 1 Bacon's Abridgment: "Choses in action belonging to an alien enemy are forfeitable to the Crown, but there must be an inquisition to entitle the King; and if a peace be made before the inquisition is taken, the cause of forfeiture is discharged." This case seems conclusive. When the peace was made the alien enemy became a friendly alien, and the King had no longer any right to take his chattels. This is one of the cases referred to by Lord Reading in the passage I have read.

I shall now refer to the statement of the Common Law in Lord Halsbury's Laws of England. I take the following statement of the law from 1 Halsbury, p. 306: "Rights and Duties of Aliens." Par. 674: "An alien friend has no legal right to enter British territory, but while in this country he owes a temporary and local allegiance to the Crown, to the same extent as a British subject, which allegiance is founded on the protection he enjoys for his own person, his family and effects during the term of that residence." 675: "At Common Law, and since 1844 by statute, an alien can acquire, hold, and dispose of goods, money, and any other personal estate other than chattels real, such as leaseholds, with the single exception of a British ship, as freely as a natural-born British subject." "Previously to 1870 an alien could hold no real estate, and this rule extended to leaseholds. He could, however, take until an inquisition was instituted by the Crown, but on a return to the inquisition being made which was termed office found the Crown was entitled to take." These paragraphs seem to me to state the Common Law in accordance with and to be fully justified by the authorities I haved quoted and those which the Lord Justice will quote. The authorities seem to me to establish that at Common Law the King never had, and, until this case, never appears to have claimed to have, the right to seize the chattels of a friendly alien resident within the realm, but that on office found he could seize his lands.

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(1) [1699] Parker, 267.

In opening the appeal, Mr. Healy thought that the matter was so clear on the statutes that it was really sufficient to read them. Having carefully read the statutes, I think if I had not known of the decision of the King's Bench Division I should have taken the same view. However, the King's Bench Division have decided that these statutes do not bind the Crown or affect the prerogative. The preamble to the Aliens Act, 1844 (7 & 8 Vict. c. 66), is as follows :—" Whereas it is expedient that the laws now in force affecting aliens should be amended, and that Her Majesty should be empowered to grant to aliens the rights and capacities of British subjects." . . . It then recites an Act of Wm. 3 "*for the further limitation of the Crown* and better securing the liberty of the subject" ; then an Act to explain this Act. The Act partially repeals these Acts. Sect. 10 contains a special oath of allegiance. It contains numerous provisions directly affecting the powers of the Crown. The Act of 1870 repeals this Act, and re-enacts its provisions with variations and additions. The Act of 1914 deals in the same way with the Act of 1870. With all respect to the Judges of the King's Bench Division, it appears to me that on settled principles the Crown is clearly bound by these Acts. These Acts, when read in connexion with the Common Law, would seem to me to remove any possible doubt in the case.

At Common Law the friendly alien could "acquire," but could not "hold" land. Why? Because the King on office found could seize it. The Aliens Act of 1844, sect. 5, provides that the alien may take and hold lands for twenty-one years for certain purposes. Surely this means without liability to seizure by the King. Sect. 4 provides that he may take and hold every species of personal property, except chattels real, as freely and effectually, and with the same rights, remedies, &c., as if he was a natural-born subject. Can it be seriously contended that this means that it is liable to be forfeited at the pleasure of the King?

It will be noted that "rights and remedies" are the words in sect. 4, and the existing "rights" of aliens residing in Great Britain to the possession or enjoyment of real and personal property are preserved by s. 15.

The Naturalization Act of 1870, sect. 2, provides that real and personal property may be taken, acquired, and held, and disposed

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of by an alien in the same manner as by a natural-born British subject. This again deals with rights of property. Does a person who holds property at the pleasure of the King hold it in the same manner as a natural-born subject? The Act of 1914 has a division entitled "Status of Aliens." It begins with sect. 17, which is identical with sect. 2 of the Act of 1870, to which the same observations apply. By the interpretation, sect. 27, "British subject" means a natural-born British subject, or a person to whom a certificate of naturalization has been granted. It will be noted that in sect. 2 of the Act of 1870, and sect. 17 of this Act, the term used is not "British subject," but "natural-born British subject." "Alien" is defined as a person who is not a "British subject." This plainly means one who is neither natural-born nor naturalized. If there were any doubt about the Common Law, these statutes would seem to me conclusive. The opening sentence of Lord Reading's judgment refers to the present law.

The judgment of the Court below is really based on two cases, *Buron* v. *Denman* (1) and the Scotch case which has been referred to. Neither case has any application to the question I have been discussing at such length. In neither was the plaintiff a friendly resident alien; in neither was he a resident in the Kingdom; in neither did he owe any temporary or local allegiance to the King; in neither was he living under the protection of our laws, and, therefore, in neither was he in any sense a subject. In *Buron* v. *Denman* (1) the declaration stated: "The plaintiff at the time, etc., was not a subject of the Sovereign of these realms . . ."; and then, being without the dominions of the Sovereign of these realms, "his goods were taken." There was no suggestion in the case that the King had not power to make the order to seize his goods. He was simply a foreigner, resident in a foreign country. He was in no way subject to English Law, or entitled to the protection of the English Law. The passage from the judgment in *Feather* v. *Reg.* (2), referring to this case, speaks of "a foreigner." This means, of course, such a foreigner as in *Buron* v. *Denman* (1). "Subject" is used in contradistinction to "foreigner." In the judgment of Dodd J., this passage is apparently read as if "foreigner" included a resident friendly alien, and "subject" meant a natural-born subject only. The present action is an action between subjects. The ordinary meaning of "subject" appears from the Century Dictionary to be in accordance with its legal meaning—namely, "one who is placed under the authority, dominion, or controlling influence of another; specifically, one who owes allegiance to a sovereign, and is governed by his laws; one who lives under the protection of, and owes allegiance to, a government" (The Century Dictionary, vol. vii, p. 6,020.) I can see no reason for suggesting that it was not used in its ordinary or legal sense. Cockburn C.J. is careful to add to his judgment in *Feather* v. *Reg.* (1) the following passage :—"But in our opinion no authority is needed to establish that a servant of the Crown is responsible in law for a tortious act done to a fellow-subject, though done by the authority of the Crown—a position which appears to us to rest on principles which are too well settled to admit of question, and which are alike essential to uphold the dignity of the Crown on the one hand, and the rights and liberties of the subject on the other."

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(1) [1848] 2 Ex. 167.

(2) 6 B. & S. 257.

As to the Scotch case, it was the decision of a single Judge. If it decided that the Crown had power to seize and forfeit the chattels of a resident friendly alien, I should (having regard to the authorities above referred to) have refused to follow it. But not only was the plaintiff in that case not a resident friendly alien, but there was actually no question of depriving him of any property. The cause of action was that "he attempted to land his cargo of fish at Aberdeen, but was twice prevented by defendants." There was no question of taking or forfeiting the fish. He was claiming a right to land fish which could not be claimed by a natural-born subject, as it was plainly prohibited by statute. His position is accurately stated in the judgment of the King's Bench: "Poll was not bound by our internal laws, but he had no rights against the King." If we substitute "therefore" for "but," there would be much in this. He was under no allegiance. The "reciprocrum ligamen quia sicut subditus tenetur ad obedientiam ita rex tenetur ad protectionem" was absent in this case as it was in *Buron's Case* (2). Pedlar was under allegiance, and "subditus tenetur ad obedientiam" applied to him. He was

(1) 6 B. & S. 257, at p. 297.

(2) [1848] 2 Ex. 167.

bound by our internal laws, and consequently entitled to the protection and benefit of our laws, including those as to the property of resident friendly aliens while resident. It is true that his overt acts of friendship were such as described by Dodd J., but this does not affect his legal rights in the present action, or his right to sue for the violation of these rights by a subject. The fact that the subject is an officer of the Crown is also immaterial unless he can show that he was authorized by law to do acts which would be unlawful if he was not such an officer. In the Scotch case the alien was attempting to enter the realm of England. There is no doubt that the realm only extends to low-water mark; and no doubt that by the Common Law the Crown can prevent an alien entering the realm, a fortiori from landing articles which our laws prohibit being landed. The order or ratification by the Crown is therefore a justification of the act of the officer in such a case. Assuming that the minute of the Chief Secretary is proof of a ratification by the King of the detention of the money by the present defendant, I am of opinion that it affords no defence to this action. The consent withdraws paragraph 1 of the defence. Paragraph 3 was withdrawn during the argument. There remains paragraph 4, which is as follows:—

"4. The plaintiff is an alien, and the said moneys and cheques (the cheques refer to cheques also seized, but they are out of the case) were taken and detained by an officer of the Crown, by the direction of the Crown, as an act of State for the defence of the realm, and for the prevention of crime, which is the detention and conversion complained of."

In my opinion there was no question to be left to the jury. It is elementary law that possession is not only presumptive, but conclusive, evidence of the right to possess unless and until a superior title is shown. If a man picks my pocket and takes my purse, can he put me on proof of my title (apparently here my beneficial title) to each coin in it?

There must be judgment for the plaintiff, with the costs of the action, of the motion in the King's Bench Division, and of this appeal. In this case we have given the plaintiff the law, the benefit and protection of which he claims by his action.

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O'CONNOR L.J. :—

I concur with Ronan L.J. William Pedlar, the plaintiff in this action, was arrested by the Dublin Police authorities on a charge of illegal drilling. When arrested he had in his possession a sum of £124, £24 of which was his own property, and £100 of which was in his possession as bailee. This sum was taken by the police officer who effected the arrest, and it is admitted that it is now in the pocket of the authorities, who want to keep it. The question we have to decide is whether they are entitled to do so or not.

The substantial defence raised by the defendant appears in paragraph 4 of the defence [His Lordship read the paragraph: see ante, p. 475].

The plaintiff is undoubtedly an alien. He was born in Ireland, emigrated to the United States, and became a naturalized citizen of the United States in January, 1916. He returned to the United Kingdom in March, 1916, in the capacity, as he says, of an official of the Irish Industrial Development Association. Having landed in Scotland, he came to Ireland, took part in the Rebellion of 1916, was arrested and sent to Frongoch, from which he was released about Christmas, 1916. He apparently stayed in England till March, 1917, and then came to Ireland. He was thereupon brought to Oxford and interned there; was released in May, 1917, and returned to Ireland, where his arrest for illegal drilling took place, as stated, in May, 1918. This charge was sustained, and he was sentenced to four months' imprisonment, and two additional months in default of giving bail. Electing not to give bail, he put up his entire term of six months' imprisonment in Belfast jail. On his release he demanded his money back, but it was refused, and he issued his writ to recover it on the 15th November, 1918. At the trial the following document was put in evidence on behalf of the defendant :—

"(1919. No. 6678.) In the High Court of Justice in Ireland,
King's Bench Division.

" *William Pedlar* v. *Lieut.-Col. W. Edgeworth Johnstone.*

"It appearing that Richard H. Boyle, Inspector of the Dublin Metropolitan Police, on the 1st May, 1918, arrested one William

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Pedlar (an alien), at Blackrock, County Dublin, on a warrant dated the 1st May, 1918, signed by Mr. Swifte, K.C., Divisional Justice, for an offence under the Defence of the Realm Act, and that the said Inspector Boyle searched the said William Pedlar after his arrest, and that there were found upon him (inter alia) the sum of £124 cash, and a cheque for £4 15*s.* 6*d.*, both of which were taken and detained by an officer of the Crown (who still retains same) as an act of State for the defence of the realm, and for the prevention of crime. Now, I, the Right Honourable Ian MacPherson, M.P., Chief Secretary for Ireland, in my capacity as a Minister of the Crown and Officer of State, and official superior of the said officer, do hereby formally ratify, adopt, and confirm the said seizure of the said cash and cheque, and the detention of same by the officer, on the grounds aforesaid.—Dated this 19th day of June, 1919. Signed, Ian MacPherson. Witness, Henry Arthur Wynne."

No evidence was given for the purpose of showing that the money was, in fact, to quote the words of the plea, "detained for the defence of the realm, and for the prevention of crime," the defendant relying, in support of his plea, solely on the plaintiff's admission that he is an alien, and on the Chief Secretary's authority given above.

The case seems to me to raise a question of difficulty, and of first-class importance. There is no doubt whatever that the ratification by the Chief Secretary puts the transaction complained of on the same footing as if the Chief Secretary had previously authorized it: *Buron* v. *Denman* (1); *The Rolla* (2); *Feather* v. *R.* (3).

Now, it is conceded, and of course it is quite clear, that if the plaintiff in this action were a British subject, the defence of "act of State" could not prevail. His money has been taken by the police authorities. They must show that it has been rightfully taken; they could not do so by saying that its taking is an act of State. And the reason is clear. The King can do no wrong. An act which is wrongful cannot, therefore, be an act which is authorized by him; or, to put it in another way, a wrongful act can never be an act of State.

(1) 2 Ex. 167. (2) [1807] 6 Ch. Rob. 364. (3) 6 B. & S., at p. 296.

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But, it is said, the plaintiff is an alien, and that makes a difference. It is, therefore, necessary to see what kind of alien the plaintiff is, and what are the legal results flowing from his status. That he is, personally, most unfriendly to the Government of this country his history shows. But the question whether an alien is an enemy alien or a friendly alien does not depend upon the personal feelings of the person whose status is inquired into. It depends on whether the State of which he is a subject is friendly or hostile. Thus, during the war, a German who loved England and hated his own country was nevertheless an enemy alien; e converso a Frenchman who hated France and loved Germany was a friendly alien. Accordingly, as it seems to me, the status of the plaintiff in this action at the time of the happening of the acts complained of, and up to the present, is that of alien friend.

What is the position, under our law, of an alien friend residing within His Majesty's dominions? I stress the residence within the King's dominions for a reason that will presently appear. His position, even at Common Law, is, in some respects, very close to that of a subject.

There are two elements in the concept of a State. First, an association or community forming the body politic; second, territory over which the community has dominion and control. The State can at will forbid the entrance into the territory either in general to every stranger, or in a particular case, or to certain persons (Vattel's Law of Nations, Book II, c. 7, s. 94); 1 Bla. Com. 259; Chitty's Prerog., p. 49); or can annex what conditions it pleases to the permission to enter it (Vattel, Book II, c. 8, s. 100; per Lord Atkinson (1)). It is likely that in very remote times, when States were in the making, the advent of strangers into the territory was not looked upon with much favour, for Grotius, referring to the law of escheatage, says that "this law was made in the ages when foreigners were almost considered as enemies" (De jure Belli et Pacis, Lib. II, c. 6, s. 14).

But whatever may have been the feelings and policy of other countries, that sagacity which has, perhaps more than any other quality, made the English such a great people, manifested itself

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(1) [1906] A. C., at p. 546.

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from the earliest times in a benevolent attitude towards strangers sojourning in England for the purpose of commerce; and, accordingly, Magna Charta (25 Edw. 3, c. 30) provided that "All merchants, if they were not openly prohibited before, shall have their safe and sure conduct to depart out of England, to come into England, to tarry in and go through England, as well by land as by water, to buy and sell, without any manner of evil tolles by the old and rightful customs, except in time of war, and if they be of a land making war against us, and be found in our realm at the beginning of the wars, they shall be attached without harm of body or goods, until it be known unto us, or our Chief Justice, how our merchants be entreated in the land making war against us; and if our merchants be well entreated there, theirs shall be likewise with us." This provision, as I think, is merely declaratory of the Common Law. In terms it has no reference to cases where entrance has been prohibited; nor does it, in my opinion, touch the right of deportation of the alien to his country, for the right to prohibit entrance or departure after entrance, is inherent in every Sovereign State.

Now, if an alien friend, not being thereto forbidden, comes and lives within the realm, certain consequences follow; he acquires certain rights; he is subject to certain duties. He comes within the King's protection: *Calvin's Case* (1); and because of that he owes allegiance to the King (1b). This allegiance, called local allegiance, is not quite as high as the allegiance of a citizen of the King, for it is merely temporary, continuing only so long as the alien is within the realm, whereas the citizen's allegiance attaches to him everywhere, until put off by naturalization in another country; but a breach of the local allegiance is punishable as treason: *Calvin's Case* (1). An alien friend, further, acquires capacity to take and possess personal chattels: *Calvin's Case* (2). But formerly he could not hold freeholds or chattels real, his disability in this respect being founded on public policy, for an interest in the soil requires a permanent allegiance, which would probably be inconsistent with his allegiance to his natural liege lord (Bac. Abr. Aliens, C); *Attorney-General* v. *Duplessis* (3)); though apparently a merchant, for the purpose of commerce, could take

(1) 7 Co. Rep. 5*b*. (2) 7 Co. Rep. 17*a*. (3) 5 Br. P. C. 91.

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a lease for years of a dwelling-house (Coke Inst., Thomas, p. 92). The alien friend also becomes subject to the ordinary laws of the realm, civil and criminal (Bac. Abr. Aliens, C 2), and acquires a right to resort to the King's Court in personal actions. This limited right to sue is stated in some authorities as based upon the reason that otherwise he would be incapacitated to trade (Bac. Abr. Aliens, D): *Openheimer* v. *Levy* (1); but I think it is more logical to put it on the ground that it is a necessary consequence of his being in the King's protection, which was the ground successfully pleaded by an alien enemy in *Wells* v. *Williams* (2).

I have now given a statement of what I conceive to be the effect of the Common Law and Magna Charta as to the status of alien friends, apart from the effect of the various Naturalization Acts which have been cited. An alien friend residing in the realm is within the King's protection; he owes allegiance to the King; he is entitled to have, possess, and sue for personal chattels. I repeat that the plaintiff, in spite of his open and notorious hostility to the King, is an alien friend. His misbehaviour, it must be assumed, was well known to the authorities, who, nevertheless, allowed him to remain in the United Kingdom, and to earn the sum of £24, part of the sum for which he now sues. The authorities could have deported him to his own country, which would have put him outside the King's protection. It may well be that if deportation was not feasible, an order commanding that he should leave, though not complied with, would deprive him of the King's protection; it may also be that any formal declaration that he had forfeited that protection would have the same effect. Nothing of that sort was done. His internment at Oxford, or deportation there, seems to me immaterial: see *Schaffenius* v. *Goldberg* (3); and, in the result, I am of opinion that we must treat this case as that of an ordinary alien friend suing for the return of his £124, which he was allowed and encouraged to make or retain in this country, and we cannot have regard, in applying legal principles to his case, to his misbehaviour or abuse of this country's hospitality.

On what principle is his right to sue different from the right of a subject to sue? I can see no ground for any distinction

(1) 2 Str. 108 [1]. (2) 1 Ld. Raym. 282. (3) [1916] 1 K. B. 284.

whatever. The King's protection is given to both, and, in my opinion, given in the same measure to both. Each of them is subject to allegiance and to the same penalty of treason for breach of that allegiance. It was argued that the Sovereign could at will declare the plaintiff ex lex (a phrase having the sanction of Sir W. Scott in *The Hoop*) (1). As I have said, that may well be, but it is not the plea on the file here, nor is there indeed any evidence to support the suggestion. On the contrary, the evidence is that he was allowed to trade here. If he sued his tailor, for example, for a misfit in a suit of clothes, the tailor could not say he was ex lex. A man cannot be ex lex and not ex lex at the same time. He cannot be ex lex for the purpose of one action, and not ex lex for the purpose of another. He cannot be ex lex ad hoc, so to speak. In my opinion the principle that the King can do no wrong applies to all persons who are within the King's protection, as the plaintiff is; and if that be so, an act of authorization by His Majesty cannot be pleaded in respect of an act which is prima facie wrongful.

The case of *Buron* v. *Denman* (2) does not seem to me to touch this case. There the plaintiff was not a resident within the realm, nor were his goods within the realm. Neither he nor his goods were ever within the King's protection; he owed no allegiance to the King; he was, for all intents and purposes, an utter stranger to the State. The same remark applies to the Scotch case to which we have been referred.

For the reasons that I have indicated, the plaintiff in this action is no stranger to the State: on the contrary, he owes allegiance to the State; and, for the purpose of all civil actions, he seems to me to be as much within the King's protection as any subject of the King.

I have left till the last the consideration of the naturalization statutes, because I think they neither help nor hinder in the conclusion I have arrived at, nor in the reasoning whereby I have come to that conclusion. The operative statute is the Naturalization Act of 1914, 4 & 5 Geo. 4, c. 17, s. 3, which provides that real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects

(1) [1799] 1 Ch. Rob. 196, 201.
(2) [1848] 2 Ex. 167.

as by a natural-born British subject. So far as personal chattels are concerned, I think this section is merely declaratory of the Common Law. If the case, however, turned upon the statute alone, I would say that it conferred on an alien the same rights in every respect to sue in respect of property as if the alien were a subject.

For these reasons, I am of opinion that the taking and detention without justification of the plaintiff's £124 is a breach of our Common Law, a breach of Magna Charta, and a breach of the Act of his present Majesty, and that no alleged act of State can be pleaded in support of it, and that there should be judgment for the plantiff for the entire sum sued for.

Solicitor for the plaintiff and appellant: *E. J. Duggan.*

Solicitor for defendant and respondent: *The Chief Crown Solicitor.*

R. ST. J. C.

ROYAL COMMISSION OF WHEAT SUPPLIES *v.* USHER & CO., Ltd. (1).

Appeal.
1920.
April 26, 27.

Arbitration — Compulsory reference — Subsequent submission by consent — Powers of arbitrator—Award— Effect.

An order made under the Defence of the Realm Act provided that the compensation for barley requisitioned should in default of agreement be determined by the arbitration of a Judge of the High Court. In pursuance of this order an arbitrator was appointed to determine the compensation, the parties having failed to agree upon the price. The parties then entered into a voluntary submission to arbitration whereby they agreed that the arbitrator should determine the amount of compensation, and "deal with all differences incidental thereto, and also with the costs of the arbitration."

Held, that the award of the arbitrator was not open to review by the Court, inasmuch as the additional powers given by the voluntary submission did not attract to the compulsory reference any right of appeal or confer upon the Court any power which it would not have had if the voluntary submission had not been made.

Appeal by the Royal Commission of Wheat Supplies, the traversers herein, from an order of the King's Bench Division of January 19th, 1920, whereby it was ordered that the traversers' motion do stand refused, and that the traversers pay to the applicants, Francis J. Usher & Co., Ltd., their costs of the motion. The appellants asked that the said order be rescinded, and that in lieu thereof it may be ordered that the award of Mr. Justice Moore in the arbitration be set aside on the ground that the learned Judge misdirected himself in holding that he might consider the true value of the barley for the purposes of compensation under the Barley (Requisition) Order, 1918, to be the same as the market value of the barley at the date of the said order, and that the learned Judge further misdirected himself in the matter upon which he estimated the compensation and in taking into consideration the price of malted as opposed to green barley in estimating the compensation, and in making no deduction by reason of the fact that 680 quarters of the barley for which he allowed compensation was held in excess of the amount which

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(1) Before Sir James Campbell C., and Ronan and O'Connor L.JJ.

Messrs. Francis J. Usher & Co., Ltd., were entitled to hold under licence from the Food Controller.

In exercise of the powers conferred upon him by Regulations 2 F and 2 G of the Defence of the Realm Regulations, the Food Controller issued the Barley (Requisition) Order dated February 26th, 1918. Clause 1 of the order provided that—

> "All persons who on the 1st March, 1918, own or have power to sell or dispose of any barley, whether home-grown barley in its natural condition, or home-grown barley which has been treated or kiln-dried, or barley which has been imported, shall place such barley at the disposal of the Food Controller, and shall deliver the same to him or such persons as may be named by him in such quantities and at such time as the Food Controller may from time to time direct."

Clause 4 directed that the Food Controller should subsequently communicate to owners of barley taken over by him the prices which he would be prepared to pay for same. Clause 5 was in the following terms:—

> "The compensation to be paid for barley requisitioned under this order shall, in default of agreement, be determined by the arbitration of a Judge of the High Court selected by the Lord Chancellor of Great Britain in England, of a Judge of the Court of Session selected by the Lord President of the Court of Session in Scotland, or of a Judge of the High Court of Ireland selected by the Lord Chief Justice of Ireland in Ireland."

Rule 2 F of the Defence of the Realm Regulations provided that—

> "Such compensation shall be paid for any article or stock so requisitioned as shall, in default of agreement, be determined by the arbitration of a single arbitrator appointed in manner provided by the order; but in determining the amount of the compensation the arbitrator shall have regard to the cost of production of the article and to the allowance of a reasonable profit, without necessarily taking into consideration the market price of the article at the time."

The applicants were maltsters, and at the date of the Barley (Requisition) Order they were entitled by licence to hold and deal with, in the course of their trade as maltsters, 7600 quarters of green barley. They had, in fact, in their possession 3281 quarters of kiln-dried, screened, and separated barley; and of these 3281 quarters, 1525 quarters were subject to certain contracts with brewers entered into in the months of December, 1917, and January, 1918, whereby the applicants had agreed, when the malting process was finished, to deliver to these brewers malted barley at the price of 28*s.* 3*d.* per quarter.

The Food Controller took over all the barley in the applicants' possession, and communicated to them the price he was willing to pay for it. They refused to accept the price offered, and asked for an arbitration. In pursuance of the provisions contained in the Barley (Requisition) Order, 1918, the Lord Chief Justice, by an order dated September 25th, 1918, appointed Mr. Justice Moore "to act as arbitrator and to determine the compensation to be paid by the Royal Commission of Wheat Supplies to the several persons named in the schedule hereto, in respect to the number of quarters of barley so requisitioned by the said Food Controller." On February 18th, 1919, the Royal Commission of Wheat Supplies and Messrs. Usher entered into a submission to arbitration, whereby they agreed that the compensation for the requisitioned barley should be determined by the arbitration of Mr. Justice Moore as the Judge selected by the Lord Chief Justice pursuant to the Barley (Requisition) Order, and that the arbitrator should have power "to deal with all differences incidental thereto, and also with the costs of the arbitration." This submission was, on February 25th, 1919, made a rule of Court.

Mr. Justice Moore found that the applicants were entitled to compensation on the true value of the barley to themselves at the time when it was taken by the traversers, which for convenience he took to be the date of the order; that he might find the true value to the applicants, if he so desired, by ascertaining the market value, notwithstanding that by the order the applicants were precluded from dealing in any market; and he accordingly ascertained the market value by reference to the contracts for malted barley existing at the date of the order. He found that on balance there was £2098 14*s.* due to the applicants, and he directed and awarded that this sum, together with costs of the arbitration, be paid to them.

The Royal Commission of Wheat Supplies, the traversers, moved in the King's Bench Division, before Gibson, Kenny, and Pim JJ., for an order setting aside the award of the arbitrator on the grounds contained in their notice of appeal set out above. The Court, Pim J. dissenting, refused the motion on the merits.

On the question of jurisdiction, namely, whether it was open to the parties by voluntary contractual submission to attach to the compulsory arbitration jurisdiction as to appeal and costs, Gibson and Kenny JJ. abstained from expressing any conclusion, although they were inclined to hold that it was not competent for the Food Controller to adopt a mode of arbitration with different incidents to those attaching to an arbitration under rule 5 of the Barley (Requisition) Order.

This appeal was conversant solely with the question of jurisdiction raised by the Court at the opening of the argument.

Wylie K.C. and *Andrews K.C.* (with them *H. O. Holmes*), for the appellants:—

It was competent for the parties to include other matters in the arbitration, to enlarge the statutory arbitration by a contractual submission so as to bring the arbitration within the Common Law Procedure Act of 1856. [They cited *Caledonian Railway Company* v. *Lockhart* (1); *Ex parte Harper* (2).]

S. L. Brown K.C., *FitzGibbon K.C.*, and *Dockrell*, for the respondents, were not called upon.

SIR JAMES CAMPBELL C.:—

This case comes before us on an appeal on behalf of the Crown from an order of the King's Bench Division refusing to set aside the award made in this matter by Mr. Justice Moore. The case is conversant with the rights of Messrs. Usher & Co., as a consequence of interference with their trade and with their stock by the Food Controller under the powers conferred upon him under certain orders made in pursuance of the Defence of the Realm Act. I need not go into these orders save in so far as to say that in regard to loss and damage consequent on or resulting from the jurisdiction conferred upon the Food Controller under these regulations there is a distinct statutory limitation to the powers of the parties to arbitrate. Sect. 5 of the Barley (Requisition) Order, 1918, runs: "The compensation to be paid for barley requisitioned under this order shall in default of agreement be determined by the arbitration of a Judge of the High Court of

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(1) 3 Macq. 808.

(2) L. R. 18 Eq. 539.

Ireland selected by the Lord Chief Justice of Ireland in Ireland." The parties having failed to agree, the Lord Chief Justice, on the 25th September, 1918, made an order which, after reciting the Barley (Requisition) Order, Regulations 2 F and 2 G of the Defence of the Realm Regulations, and the facts of the case, provides as follows: "Now I, the Right Hon. Thomas Francis Molony, Lord Chief Justice of Ireland, in pursuance of the provisions in that behalf contained in the Barley (Requisition) Order, 1918, do hereby appoint and select the Honourable William Moore, one of the Judges of the King's Bench Division of the High Court of Justice in Ireland, to act as arbitrator, and to determine the compensation to be paid by the Royal Commission of Wheat Supplies to the several persons named in the schedule hereto." This is plainly—the contrary is not contended—an appointment under the powers of the Regulation to which I have referred, and therefore is, in my opinion, to all intents and purposes, a compulsory reference to arbitration. Being a compulsory reference, the parties, conscious of the fact that no provision was made for the determination by the arbitrator of the costs of the proceedings, endeavoured to cure this defect by a submission bearing date February 18, 1919, and by this submission it is agreed that the arbitrator, Mr. Justice Moore, whom it recites as the Judge selected by the Right Hon. the Lord Chief Justice, pursuant to the order, shall have power to deal with all differences incidental to the determination of the price, and also with the costs of the arbitration.

As at present advised, I do not see any legal objection to the parties arriving at such a submission, and giving to the statutory arbitrator a power, by consent, to deal with other matters not covered by the statutory arbitration; but I am quite satisfied that the addition of these powers as a result of this voluntary submission could not attract to the compulsory submission any rights such as the right of appeal, or confer upon this Court or the King's Bench Division any power which it would not have had if this voluntary submission had not been made. So far as the price is concerned, there was a statutory reference to arbitration without the consent of the parties; and I am of opinion that the Irish Arbitration Act does not apply, and that neither we nor the King's Bench Division have any jurisdiction to entertain this application or appeal on a motion to affirm or set aside the award. I would rather infer that Mr. Justice Gibson and Mr. Justice Kenny entertained the same opinion, but held that in refusing the application made to them on behalf of the Food Controller they had sufficient jurisdiction for that purpose; but if we were to assume jurisdiction we could only assume it for the purpose of determining the whole matter; and we could not allow the case to proceed on the basis that if in the end we came to the conclusion that the appellant was right we could not afford him any relief. Therefore we think that we cannot entertain this appeal. The parties are not without a remedy, because, as has been pointed out, if the appellants choose to test the matter further they may refuse to pay the amount awarded, thus compelling the respondents to resort to their remedy by petition of right.

We must dismiss this appeal; but, inasmuch as the question of jurisdiction has been raised by the Court, and not by the parties, we shall allow each party to abide their own costs of this appeal. We do not interfere with the costs of the motion in the King's Bench Division.

Ronan L.J.:—

I agree. In this case I gave a judgment dealing with the question of jurisdiction. Mr. Lehane, the learned reporter, has since called my attention to my judgment in the case of the *Dublin Southern, etc., Supply Co* v. *Kingstown Urban District Council* (1), where I dealt fully with the matter. I refer to that judgment to avoid useless repetition. On the question of jurisdiction, the only distinctions between that case and the present are—1, that here the selection of the arbitrator is left to the Lord Chief Justice, and the person selected must be a Judge of the High Court: as to this, I think it plain that it was as a persona designata, and not under his jurisdiction as a Judge of the High Court, that Moore J. acted in the matter; and 2, the agreement of February 18th, 1919, between the Royal Commission of Wheat Supplies and Usher & Co. I do not think that this agreement purports to set aside the jurisdiction of Moore J. under the appointment by the

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(1) 51 I. L. T. R. 109.

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Lord Chief Justice. I am of opinion that it was under this jurisdiction he acted, and that the arbitration was a compulsory arbitration under the statutory authority. Notwithstanding the agreement, I am further of opinion that the mode of fixing the price being prescribed by statutory authority, it was not competent to the Royal Commission, acting solely in virtue of powers conferred by the same statutory authority, to adopt another mode of fixing the price, i.e., a consensual submission to arbitration which would materially alter the position, as this would give the Court jurisdiction under the Common Law Procedure Act to review, and if it thought right to set aside, the award—a jurisdiction it would not have had under the statutory arbitration.

I think we should decide the question of our jurisdiction, particularly as there is no appeal from our decision. It would be very unfortunate if we set aside the award, having no jurisdiction to do so.

O'Connor L.J.:—

It may be that it was altogether ultra vires the Food Controller to enter into any submission at all. There seems to me much force in the suggestion that the regulations, by laying down a specific form of arbitration, negative the possibility of any other form.

It is, however, unnecessary to decide this. The submission was entered into in purported pursuance of the power to arbitrate provided by the regulation. It was probably entered into out of a misconceived abundance of caution; but, at any rate, in my clear opinion, it cannot give an appeal from the award, where under the regulation the award is not subject to appeal.

Where there is in law no appeal, consent of the parties can give no appeal; and it is incumbent on us where we are clearly of opinion that no appeal lies to refuse to entertain one, though we are, more or less, invited to do so by both sides.

I express no opinion as to whether the Food Controller can, in a petition of right, set up any alleged invalidity or erroneous decision in the award. I agree that the appeal should be dismissed, our order specifically showing on its face that we do so because there is no jurisdiction to entertain an appeal.

Solicitor for the appellants: *Sir Henry Arthur Wynne, Chief Crown Solicitor.*

Solicitors for the respondents: *D. & T. Fitz Gerald.*

C. L.

H. L.
1920.

[House of Lords.]

BRADSHAW *v.* M'MULLAN.

Landlord and tenant—Rates—Lease at a rent "including rates and taxes"—Deduction—Poor rate proper—Items raised by means of poor rate—Local Government (Ireland) Act, 1898 (61 *&* 62 *Vict. c.* 37), *sect.* 52, *sub-s.* 2.

The decision of the House of Lords (ante, p. 412) confined by their order to poor rate proper.

On the settlement in Committee of the order, the question was raised whether the decision of the House should not be confined to poor rate proper, i.e. not including police rate, bridge rate, &c. (1), and the following is the curial part of the order drawn up, the sum of £7 2*s.* 1*d.* therein mentioned being poor rate proper, and not including any such items as aforesaid.

It is ordered and adjudged by the Lords Spiritual and Temporal in the Court of Parliament of His Majesty the King assembled that the said order of His Majesty's Court of Appeal in Ireland of the 22nd day of January, 1919, complained of in the said appeal be and the same is hereby reversed; and it is further ordered that the judgment of the Lord Chief Justice of Ireland of the 14th day of January, 1918, be and the same is hereby restored in so far as it decides that the respondent is not entitled to deduct the poor rate from his rent under sect. 52 of the Local Government (Ireland) Act, 1898; and it is further ordered that the cause be and the same is hereby remitted back to the King's Bench Division of the High Court of Justice in Ireland with an instruction to enter judgment for the plaintiff for £7 2*s.* 1*d.* with costs of the claim, and to do therein as shall be just and consistent with this judgment. And it is also further ordered that the respondent do pay or cause to be paid to the said appellant the costs incurred by her in the courts below, and also the costs incurred by her in respect of the said Appeal to this House, the amount of such last-mentioned costs to be certified by the clerk of the Parliaments.

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(1) See 61 & 62 Vict. c. 37, sect. 66, sub-s. 5.

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See MALICIOUS INJURY. 2.

FRANCHISE—
See PARLIAMENT—FRANCHISE.

GUARDIANS OF POOR—Powers of, in relation to cancellation of contracts - 399
See CONTRACT.

HOSPICE—Maintenance in—Temporary benefit - - - - - 347, 355
See OLD AGE PENSION.

HOUSE OF LORDS PRACTICE—Divorce Bill - - - - - 343, 345
See PRACTICE—DIVORCE BILL. 2.

ILLICIT DISTILLATION—"*House or place*"—"*Proprietor or occupier*"—*Trespasser—Absence of knowledge*—1 & 2 *Wm.* 4, *c.* 55, *s.* 17.] The word "place" in 1 & 2 Wm. 4, c. 55, s. 17, has its full ordinary meaning, and is not controlled in any way by its proximity to the word "house"; and "proprietor or occupier," in the same section, cannot be one whose land has been invaded without his knowledge, but is some one in immediate actual control of the place where illicit distillation is carried on. *Devlin* v. *Conlin* K.B.D. 179

INSURANCE POLICY—Misrepresentation by agent—*Authority to make—Ultra vires transaction—No right to retain benefit so obtained—Return of Premium—Friendly Societies Act*, 1896 (59 & 60 *Vict. c.* 25), *sect.* 45.] A person was induced to take out an endowment policy in an Assurance Society registered under the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), on the representation of the society's agent, that on payment of a first premium the insured would obtain an immediate loan of £100 without security and without interest. Under the Act a registered society can make loans only to members of at least one full year's standing. Having paid the premium, the insured applied to the society for a loan of £100; but, relying on the statute and their rules, the society refused to grant the application. Thereupon the insured, alleging false and fraudulent representation on the part of the society's agent, claimed by Civil Bill process the return of the premium. *Held*, by the King's Bench Division (Gibson and Gordon JJ.), that the complete absence of authority in the agent to make the representation, or to give the undertaking, made it impossible for the plaintiff either to fix the society with fraud or to recover back the cash; and that, viewed as an ultra vires transaction, the payment could not found any legal remedy. *Held*, by the Court of Appeal (reversing the King's Bench Division), that the society could not be allowed to retain money which had been procured for and received by it under a contract which the insured had been induced to enter into by the fraudulent misrepresentation of its agent; that even though the agent's representation involved the doing of an act which was illegal or ultra vires on the part of the principal, he was nevertheless acting within the scope of his authority in making it, in so far at least as to deprive the society of the right to retain any benefit under it. *Byrne* v. *Rudd* - - K.B.D.; APP. 12, 20

JUSTICE—Essentials of—No evidence to support particular charge - - - 230
See PRACTICE—CERTIORARI.

LANDLORD AND TENANT — RENT — Rates—Poor-rate—*Lease of a rent "including rates and taxes"—Deduction — Indemnity — Estoppel—Res judicata—Local Government (Ireland) Act*, 1898 (61 & 62 *Vict. c.* 37), *sect.* 52, *sub-s.* 2.] By a proposal in writing, dated the 1st December, 1908, and subsequently accepted, *M* agreed to take from *B* certain business premises for a term of thirty-one years, at the yearly rent of £240, "including all rates and taxes as at present existing or assessed on said premises," and *M* further agreed to pay five-sevenths of all future or increased taxation caused by alterations or improvements stipulated for in the agreement. In an action for rent by *B* against *M*, *M* claimed credit for the amounts of poor-rate paid by him. He also relied on certain prior proceedings and the findings therein as an estoppel, and as amounting to res judicata. *Held*, by the House of Lords, that the provision as to rates was a "contract to

LANDLORD AND TENANT—*continued.*
the contrary respecting such deduction" within the meaning of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), sect. 52, sub-s. 2, and was void; that in the circumstances there was no estoppel; that the matter was not res judicata; and that *M* was not entitled to the credit claimed. The decision of the Court of Appeal, affirming that of a majority of the King's Bench Division, reversed, and the judgment of Campbell L.C.J. at the trial restored. *Bradshaw* v. *M'Mullan.* The decision of the House of Lords confined by its order to poor-rate proper. [H.L. 47, 412, 490

LANDLORD AND TENANT — Standard Rent - - - - - - 106
See WAR EMERGENCY LEGISLATION.

MACHINE OR ENGINE—Damage to Plough [143
See MALICIOUS INJURY. 3.

1. MALICIOUS INJURY—Bailee's Right to Compensation—*" Person injured"—Punitive damages—Costs of Appeal—Grand Jury (Ireland) Act*, 1836 (6 *&* 7 *Wm.* 4, *c.* 116), *sect.* 135; *Local Government (Ireland) Act*, 1898 (61 *&* 62 *Vict. c.* 37), *sect.* 5—*County Court Rules*, 1890, *rule* 17; *R.S.C.*, 1905, *Order* 59, *rule* 77.] An agister of cattle, maliciously driven off his lands, is, as a bailee in possession, a "person injured" within the meaning of sect. 135 of the Grand Jury (Ireland) Act, 1836, and is entitled to recover compensation for the injury done. Punitive damages may not be awarded under the Malicious Injuries Code for injuries maliciously done to property. The Court, having regard to the difficulty and importance of the case, awarded £50 in respect of the costs in the Court of Appeal under Order 59, rule 77, of the Rules of the Supreme Court, 1905, holding that the limit of £20, imposed by the County Court Rules, 1890, rule 17, does not apply to costs in the Court of Appeal. *Worthington* v. *Tipperary County Council* - - - 233

2. MALICIOUS INJURY — Farm gate— Compensation—*Grand Jury (Ireland) Act*, 1836 (6 *&* 7 *Wm.* 4, *c.* 116), *sect.* 135.] Section 135 of the Grand Jury (Ireland) Act, 1835 (6 & 7 Wm. 4, c. 116), enacts that compensation may be awarded for the malicious destruction or injury of "any bank, gate, . . . or other work belonging to any person, public canal, or navigation." *Held* (O'Connor L.J. dissenting), that a farm-gate is within the section. *Bell* v. *King's County County Council* ([1910] 2 I.R 25) not followed. *Milligan* v. *Corporation of Londonderry* - - APP. 1

3. MALICIOUS INJURY—Plough, *damage to — Machine or engine—Compensation — Consequential damage—Grand Jury (Ireland) Act*, 1836 (6 *&* 7 *Wm.* 4, *c.* 116), *sect.* 135; *Local Government (Ireland) Act*, 1898 (61 *&* 62 *Vict. c.* 37), *sect.* 5, *sub-s.* 1.] Malicious damage to the extent of £2 was done to an ordinary agricultural plough, the property of the applicant, who also suffered monetary loss amounting to £3 5*s.* by being deprived of the use of the plough, which could not be repaired for a considerable time. *Held*, by the Court of Appeal, 1, that the plough was a "machine or engine . . . used . . . for ploughing" within sect. 15 of the Malicious Damage Act, 1861, and accordingly that, as the damage to the plough was a crime punishable on indictment under that Act, the applicant was entitled to compensation under sect. 135 of the Grand Jury (Ireland) Act, 1836, as amended by sect. 1 of the Local Government (Ireland) Act, 1898; and 2, that the amount of compensation was not necessarily limited to the amount of actual damage done to the plough, but might include the resulting damage which was the natural consequence of the malicious act. *Noblett* v. *Leitrim County Council* - - - - APP. 143

4. MALICIOUS INJURY—Personal injuries—*Criminal Injuries (Ireland) Act*, 1919 (9 *Geo.* 5, *c.* 5)—*Scope of Act—Payment of amount awarded.*] The Criminal Injuries (Ireland) Act, 1919 (9 Geo. 5, c. 5), applies only to injuries to persons, and not to injuries to property. *R.* (*Barham*) v. *Leitrim County Council* - - - K. B. D. 41

5. MALICIOUS INJURY—Personal injuries—*Injuries committed within one mile of boundary of neighbouring county—Compensation—Apportionment—Grand Jury (Ireland) Act*, 1836 (6 & 7 *Wm.* 4, *c.* 116), *sect.* 140; *Local Government (Ireland) Act*, 1898 (61 & 62 *Vict. c.* 37); *Criminal Injuries (Ireland) Act*, 1919 (9 *Geo.* 5, *c.* 14.)] Section 5, sub-s. 2, of the Local Government (Ireland) Act, 1898, extends to and includes injury to persons as well as to property, and gives jurisdiction in all cases to apportion compensation awarded for criminal injuries in the manner provided by section 140 of the Grand Jury (Ireland) Act, 1836. The power of apportionment given by that section is not limited to compensation awarded in respect to injuries to property. Section 1, sub-s. 2, of the Criminal Injuries (Ireland) Act, 1919 (9 Geo. 5, c. 14), gives a wider power of apportionment than that conferred by section 140 of the Grand Jury Act, because it does not limit the jurisdiction to cases where the injury is committed within one mile of the boundary of a neighbouring county or counties. *Lloyd* v. *Cork County Council* - - - - APP. 405

MARRIED WOMAN'S qualification as elector [192
See PARLIAMENT—FRANCHISE. 2.

MASTER AND SERVANT — *Volunteer—Dangerous employment—Duty to instruct—Duty to employ competent servant—Common interest—Common employment — Negligence—Liability of master.*] The plaintiff, a boy of eleven years, sued the defendant, a carrier, for damages for personal injuries occasioned by the alleged negligence of the defendant. The boy was directed by the defendant's foreman to accompany the driver of a horse and cart, in the defendant's employment, for the purpose of guiding the driver, who was a stranger to the district, on his proper route. There was evidence that the boy had been similarly directed by the foreman on previous occasions, and received small payments from the drivers, but he was never paid anything by the defendant. On the day in question, when the boy was accompanying the driver, and was sitting on the side of the cart, the driver, who was leading his horse up a lane, drew aside to pass another man, and one of the wheels of the cart caught in a rut in the water-table of the lane, with the result that the boy was thrown off, and sustained serious injuries. The defendant offered no evidence, and the learned Judge at the trial directed a verdict for the defendant. On an application for a new trial: *Held*, by the majority of the Court of Appeal (Sir J. Campbell C. and O'Connor M.R., Ronan L.J. diss.), reversing the decision of the King's Bench Division, that the boy was not in the employment of the defendant or a fellow-servant of the carter, that he was not a mere volunteer, but was employed upon the invitation of the defendant's foreman, acting within the scope of his employment, to perform work in which both he and the defendant were interested, and that the case therefore ought not to have been withdrawn from the jury. The doctrine of common employment, as applicable to children of tender years, considered. *Murphy* v. *Ross*
[APP. 199

MISREPRESENTATION, fraudulent by agent - - - - - - 12, 20
See INSURANCE POLICY.

NATURALIZATION ACTS bind the Crown
[450
See ALIEN.

1. NEGLIGENCE—**Contributory negligence** —*Continuing negligence of plaintiff—Continuing negligence of defendant—Cause of injury.*] The plaintiff, an active woman, was desirous of crossing a thoroughfare in the City of Cork in broad daylight. She stepped off the footpath to cross the street, and, according to her own evidence, stood for a short period about one yard outside the kerb to let the traffic clear. There was a van standing five or six yards to her left, and she was looking to the left, when suddenly she became aware of the approach of a horse and van, and she was knocked down and sustained injuries. The horse and van which collided with the plaintiff were the property of the defendant, the van being a bread-van; and the evidence of the driver, which was otherwise corroborated, was that when at a distance of about ten yards from the spot where the plaintiff stepped off the kerb, and without having seen the plaintiff —if, in fact, she had then left the footpath—he turned round to push back a loaf of bread which was in danger of falling from the front of his van, and when he again looked to his front he endeavoured to pull up, but was too late to avoid the accident. The jury found that the defendant's driver was guilty of negligence, that the plaintiff was guilty of contributory negligence, and that the defendant's driver could not, by the exercise of reasonable care, have avoided the consequences of the plaintiff's negligence, and judgment was entered for the defendant. On a motion by the plaintiff for a new trial: *Held*, by the Court of Appeal (Sir J. Campbell C. and O'Connor L.J., Ronan L.J. diss.), reversing the decision of the King's Bench Division (Gibson and Gordon JJ.), that the original negligence of the defendant's driver in turning round was not a continuing negligence, but that the accident was occasioned by the negligence of the plaintiff, and that she was not entitled to a new trial. Ronan L.J. (diss.) *held* that there was ample evidence that if the driver had kept a reasonable look-out he could have avoided the accident, and that the plaintiff was entitled to a new trial. *British Columbia Electric Railway Company, Ltd.*, v. *Loach* ([1916] A. C. 719) considered. *Neenan* v. *Hosford*
[K. B. D. APP. 258-268

2. NEGLIGENCE — **Non-feasance** — *Local Drainage Board—Trustees' failure to perform duties —Injury caused to riparian owner—Drainage (Ireland) Act*, 1842 (5 & 6 *Vict. c.* 89).] The defendants were the duly constituted trustees of drainage works carried out under the Drainage (Ireland) Act, 1842 (5 & 6 Vict. c. 89), the works consisting of the clearing out, and in some places the widening and deepening, of the bed of a natural river which flowed through the plaintiff's lands. The defendants for a number of years had done nothing towards maintaining the works, and had allowed the river to silt up and become choked, with the consequence that the water overflowed upon the plaintiff's lands, and damaged his crops. *Held*, by the Court of Appeal (affirming the decision of the King's Bench Division), that the plaintiff was entitled to maintain an action for damages against the defendants, as trustees of the drainage works, for the injury caused to his crops by reason of their neglect. *Bohan* v. *Clements*
[APP. 117

3. NEGLIGENCE — Tramcar — Signal to start tramcar given by passenger—*Liability of defendants—Duty of counsel on settlement of questions for jury.*] In an action for negligence the evidence for the plaintiff was to the effect that, while a tramcar was at a standstill at a compulsory stopping place, indicated by a red signal-post, the plaintiff proceeded to enter, but, as she had put her foot on the step, a passenger on the platform rang the conductor's starting bell, and the driver put the tram in motion, with the result that the plaintiff was thrown to the ground and sustained serious injuries; that during all this time the conductor was on the top of the car collecting fares; and that during the earlier part of the same journey the bell had been rung by passengers on at least three occasions. At the trial the defendants' counsel called no evidence, and asked for a direction. The jury found for the plaintiff. *Held*, by the King's Bench Division, that there was sufficient evidence to sustain the verdict of the jury. *Held* also, that it was not open to the defendants' counsel to rely on any defects in the questions to which he had not drawn the Judge's attention at the trial. The decision of the King's Bench Division on the main question affirmed by the Court of Appeal. Per Sir J. Campbell C.: Where, at the close of the plaintiff's case, counsel for the defendant asks for a direction which is refused, and does not go into evidence, he has no responsibility for the form or sufficiency of the questions submitted to the jury, and is in no way estopped from questioning or criticizing them in any subsequent proceedings. The duty of Judge and counsel in relation to the framing of questions for the jury stated. *Steele* v. *Belfast Corporation*
[K.B.D. 125, 133

4. NEGLIGENCE—Passenger jumping from tramcar in motion—*Accident occasioned thereby—Tramway Company and intending passenger—Volenti non fit injuria—Duty of company to person wrongfully on car—Regulations—Effect of, when not enforced.*] The plaintiff, wishing to mount one of the defendants' tramcars, waited at one of the appointed stopping places. When the car approached the stopping place, it slowed down, but, as it was full, it did not stop. Whilst the car was in motion, a passenger already on the car jumped off, and the plaintiff swung himself on to the step of the moving car, seizing a bar with each hand, and placed one foot on the platform with a view to mounting further. The conductor, who had been inside the car collecting fares, thereupon came out on the platform, and closed the gate of the platform against the plaintiff, saying to him that the car was full and he could not get on, to which the plaintiff replied that he was already on the car, and that another passenger had got off. The conductor then said, "It does not matter; you must get off"; and when the plaintiff then asked that the car should be slowed down to enable him to alight, the conductor refused, saying, as the plaintiff alleged, in an aggressive tone, "I will not; you must get off." The plaintiff then jumped from the car, which had then increased its speed, and incurred injuries. In an action against the company for damages for negligence, the Judge at the trial, at the close of the plaintiff's case, directed a verdict for the defendants. On an application by the plaintiff for a new trial: *Held*, by the Court of Appeal (Ronan and O'Connor L.JJ., Sir J. Campbell C. dissenting), that the judgment of the King's Bench Division (Kenny and Moore JJ., Molony C.J. dissenting) refusing a new trial should be reversed, on the grounds that it was not sufficiently clear that the injuries of the plaintiff were incurred solely by his own voluntary act, and that there was some evidence fit to be submitted to a jury of breach of duty on the part of the defendants' servant. *Delany* v. *The Dublin United Tramways Co.* (30 L. R. Ir. 725) considered. *Cullen* v. *Dublin United Tramways Company*
[K.B.D. App. 63, 74

NEGLIGENCE—Injury to boy of eleven guiding cart - - - - - - 199
See Master and Servant.

NEXT-OF-KIN passed over for grant of administration - - - - 254
See Probate—Grant of Administration.

NOTICE of acceptance of money lodged in Court with a plea of tender—Failure to give [61
See Practice—Payment into Court.

NOTICE TO QUIT - - - 444
See Practice—Judgment.

OLD AGE PENSION—Disallowance—*Means of pensioner—"Yearly value of any benefit or privilege enjoyed"—8 Edw. 7, c. 40, s. 4, sub-s. 1 (d), and s. 7; 1 Geo. 5, c. 16, s. 6.*] An old age pensioner through infirmity and old age sought admission to the Hospice for the Dying, and was received and maintained free of charge in that institution from 11th July, 1919, to the 3rd October, 1919, on which later date he was discharged. The average cost of maintenance in that institution was stated to be from 25*s.* to 28*s.* per week, and the total cost of the patient's maintenance during the period he was a patient of the Hospice did not therefore exceed the statutory limit of £31 10*s.* Save his pension, the pensioner had no means. The Local Pensions Officer, having raised a "question" as to whether the pensioner was entitled to any pension, the Local Pensions

OLD AGE PENSION—*continued.*
Committee decided that he was not so entitled, and that decision was affirmed by the Local Government Board in respect of the period during which the pensioner was maintained in the Hospice, on the ground that "the value of the privilege which the pensioner enjoyed exceeded the statutory limit of £31 10*s*." On an application for a writ of certiorari to quash this decision, and for a mandamus to the Local Government Board to hear and determine the appeal according to law: *Held*, 1, that the benefit enjoyed by the prosecutor, being casual and temporary, did not come within the statutory description "the yearly value of any benefit or privilege"; 2, that the decision of the Board, being good on its face and within jurisdiction, and made by the statute "final and conclusive," was not the subject of certiorari and mandamus; 3, that the Board was not bound by its previous decision, "though final and conclusive," as regards external authorities. *R.* (*Rooney*) v. *The Local Government Board for Ireland* - - - K.B.D. 347; APP. 355

1. **PARLIAMENT—FRANCHISE**—Claim—*Particulars—Forms—Representation of the People Act*, 1918—*Order in Council* (25*th June*, 1919.] Where a claim to the franchise (parliamentary or local government) is made by one person on behalf of another, it is essential to the validity of the claim that the prescribed form should contain a declaration giving the same particulars as to the person on whose behalf the claim is made as that person would be required to give if he were claiming on his own behalf, and the omission of such particulars cannot be cured by the subsequent proof thereof to the satisfaction of the registration officer. *Campbell* v. *Purdy* - - APP. 186

2. **PARLIAMENT — FRANCHISE**—*Woman—Married woman's qualification—"Husband entitled to be so registered"—Representation of the People Act*, 1918 (7 & 8 *Geo.* 5, *c.* 64), *sect.* 4, *sub-s.* 1.] Under sect. 4, sub-s. 1, of the Representation of the People Act, 1918 (7 & 8 Geo. 5, c. 64), a woman is entitled to be registered as a parliamentary elector if she has attained the age of thirty years, and is not subject to any legal incapacity, and is entitled to be registered as a local government elector in respect of the occupation in the constituency of land or premises (not being a dwelling-house) of a yearly value of not less than £5, or of a dwelling-house, "or is the wife of a husband entitled to be so registered." *Held*, that the words "entitled to be so registered" refer to the immediately foregoing qualifications, and consequently that the wife of a man who was entitled to the local government franchise in respect of premises other than a dwelling-house of a yearly value of less than £5 was not in that capacity entitled to the parliamentary franchise. *Quinn* v. *Sinclair* - - - - - APP. 192

PARTICULARS—Undue influence not ordered [194
See PRACTICE—PROBATE. 2.

PAUPER PETITION — House of Lords Practice - - - - 343
See PRACTICE—DIVORCE BILL. 2.

PETITION OF RIGHT—Practice—Trial without jury - - - - 365
See VENDOR AND PURCHASER—CONTRACT.

PLACE OF TRIAL—Where the defendant applies to the Court to discharge or vary an order made on the certificate of the Attorney-General under 50 & 51 Vict. c. 20, s. 4, changing the place of trial of a defendant charged with a crime committed in a proclaimed district, and satisfies the Court that the trial can be more fairly and impartially had in a county other than the county named in the order of removal, it is the duty of the Court under the statute to order that the trial shall take place in the county in which it shall appear that the trial can be most fairly and impartially had. *The King* v. *FitzGerald and Others* - 428

PLACE OF TRIAL—The defendants were returned for trial to the next Assizes for the County of Limerick on a charge of wilful murder of Sergeant Peter Wallace, R.I.C., and Constable Michael Enright, R.I.C., at Knocklong, in that county. On the Attorney-General's certificate, under the provisions of the Criminal Law and Procedure (Ireland) Act, 1887, the Court, on the 19th February, made an order that the trial should be had in the City of Belfast. Counsel for the defendants asked that the place of trial should be changed to the County of the City of Cork, the County of the City of Dublin, or the County of Dublin; but on the hearing of the application counsel for the accused limited the application to the County or City of Dublin. The Court changed the venue to the County of Armagh. *R.* v. *Maher and Others* - - - - - - 440

"**PLACE**"—Ordinary meaning - - 179
See ILLICIT DISTILLATION.

PLOUGH—Damage to - - - 143
See MALICIOUS INJURY. 3.

PNEUMONIA—Death supervening from—"Accident" - - - - 154
See WORKMEN'S COMPENSATION. 1.

POOR LAW—Contract cancellation, - 399
See CONTRACT.

POOR-RATE—Rent, "including all rates and taxes"—Indemnity not deduction 47, 412
See Landlord and Tenant—Rent.

POSSESSION—Recovery of—Standard rent—Rates paid by landlord - - 106
See War Emergency Legislation.

PRACTICE—CERTIORARI *to quash conviction—Alleged admission by defendant—Essentials of justice—No evidence to support the particular charge.*] On a summons for making use of abusive and threatening language, the complainant was unable to prove the date of the occurrence, but the magistrates who tried the case convicted the defendant on an admission alleged to have been made by him to the effect that he was, on a later date than that mentioned in the summons, in the place where the occurrence was alleged to have taken place. *Held*, that it was not competent for the complainant to rely on this alleged admission of the defendant, that the conviction was in disregard of the interests of justice, and that therefore a writ of certiorari to quash the conviction should be granted. *R.* (*Cahill*) v. *Justices of Dublin County.* [K.B.D. 230

PRACTICE — COSTS — Two counsel — *Case for proofs — Consultation — Disallowance by Taxing Master.*] In actions in the King's Bench Division, where a sum exceeding £50 is claimed, the Taxing Master, in exercising his discretion in taxing the defendant's costs, should act on the presumption that it was proper to retain two counsel, and should not disallow them save for what appears to him to be reasonable cause. The rules contemplate that where an action is to be tried upon oral evidence a case to advise proofs will be submitted to counsel. The Taxing Master has no discretion to disallow the costs incidental thereto. The dicision of the Taxing Master, disallowing a fee for consultation which had been certified for by senior counsel, was overruled, and the item allowed. *Power* v. *M'Enery* - - - - K.B.D. 356

1. **PRACTICE — DIVORCE BILL — Evidence on Commission**—*Attendance of witnesses dispensed with.*] The House gave leave (12 March, 1920) for evidence taken on commission to be read, and dispensed with the attendance of the witnesses examined on commission. *Carbery Divorce Bill* [H.L. 345

2. **PRACTICE—DIVORCE BILL—Petition to sue in forma pauperis**—*Delay in taking proceedings.*] In a proper case the House of Lords will allow a petitioner in a Divorce Bill to prosecute his bill in forma pauperis. *White's Divorce Bill.* (*No.* 1) - - - - H.L. 343

PRACTICE — JUDGMENT — *Action for recovery of land—Order* 14, *r.* 1—*Specially indorsed writ—Tenancy "duly determined by notice to quit"—Order* 3, *r.* 6 (*F*).] In an agreement for a tenancy from year to year there was a clause providing that, in the event of the landlord requiring the premises for the purpose of letting or selling same along with adjoining premises, he should be entitled to determine the tenancy by a month's notice to quit. Alleging that the event mentioned in the agreement had happened, the landlord served notice to quit upon the tenant, and at its expiration served a specially indorsed writ for recovery of possession of the premises. An order for final judgment was made by the King's Bench Division. *Held* (reversing the King's Bench Division), that the words "duly determined by notice to quit" in Order 3, rule 6 (F), refer to cases in which the determination of the tenancy is a legal consequence of the contract, and do not apply where the right to serve the notice depends on express agreement between the parties; and accordingly, that plaintiff could not obtain leave to enter judgment for recovery of the land under Order 14, rule 1. *Arden* v. *Boyce* ([1894] 1 Q. B. 796) and *Gleeson* v. *Keown* (32 I. L. T. R. 150) followed. *Stokes* v. *Tracey* - - App. 444

PRACTICE — PAYMENT INTO COURT with a plea of tender—*Acceptance in satisfaction—Failure to give notice thereof to defendant—Order* 22, *rule* 8—*Motion to dismiss for want of prosecution.*] In an action for a liquidated demand, the defendant as to portion thereof pleaded a defence, and as to the balance pleaded tender before action and payment into Court. The plaintiff drew out the sum so lodged, but did not give the notice of acceptance prescribed by Order 22, rule 8. *Held*, that the defendant was entitled to an order dismissing the action for want of prosecution, with costs (measured) of the motion, and to his taxed costs of the action. *Grimes* v. *Connell* [K. B. D. 61

PROBATE—GRANT OF ADMINISTRATION to a stranger—*Probate Act* (*Ireland*), 1857 (20 & 21 *Vict. c.* 79), *sect.* 78.] Under the 78th section of the Probate Act (Ireland), 1857, the Court may, in a proper case, give liberty to a stranger, passing over the next-of-kin, to apply for a grant of administration, if, on the facts, the Judge is satisfied that it is expedient to do so. *In re O'Reilly, Deceased* - - - App. 254

PROBATE—GRANT OF—Soldier's will—*Postcard and letter—Whether testamentary or not—Death after demobilization—Wills Act,* 1837 (1 *Vict. c.* 26), *s.* 11.] The deceased on mobilization wrote a postcard to his cousin (the applicant) directing the latter, in the event of his death, to

PROBATE—*continued.*
inquire of his regimental company for anything left behind. While on active service in France he wrote to the same cousin a letter saying (inter alia) that, if anything happened to him, his cousin could "claim all belongs to me, because it is in my will." The deceased died after demobilization. *Held*, first, that the postcard and letter taken together constituted a good soldier's will, within s. 11 of 1 Vict. c. 26, and that the applicant as universal legatee thereunder was entitled to administration of the deceased's estate, with the will annexed. And secondly, that a return to civil life prior to death does not operate as a revocation of a soldier's will, in the absence of any expression of intention to the contrary in the document itself. *In the Goods of Coleman* [K. B. D. (Prob.) 332

1. **PROBATE — PRACTICE—Bodily infirmity of executor**—*Auxiliary grant of administration made to another person.*] Where an executor's bodily health is such that he is unable to perform the duties of his office, the Court has jurisdiction to impound the grant made to him, and to make a grant of administration to another person, limited during the executor's incapacity. *In the Goods of Knott* - - - K. B. D. 397

2. **PROBATE — PRACTICE—Undue influence**—*Particulars.*] It is the settled practice of the King's Bench Division (Probate) not to require a party alleging undue influence to give particulars of the acts of undue influence. So *held* by the Court of Appeal (affirming Kenny J.). *Lord Salisbury* v. *Nugent* (9 P. D. 23) followed. *Wallace* v. *M'Dowell and MacKeown* App. 194

PROOFS—Advice of—Costs of case - 357
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PUNITIVE DAMAGES - - - 233
See Malicious Injury. 1.

QUESTIONS FOR JURY—Duty of counsel in relation to settlement of 125, 133
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RATES—Contract to deduct from rent—Invalidity - - - - - 47, 412
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REGISTRATION—Declaration in claim for franchise - - - - - 186
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RES JUDICATA - - - - 47, 412
See Landlord and Tenant—Rent.

REVENUE—INCOME TAX—Stud farm—*Stallion fees—Mode of assessment—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *sect.* 63, *Schedule B*; *sect.* 100, *Schedule D, First Case, Sixth Case—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *sect.* 2, *Schedules B and D.*] The owner and occupier of a farm used it principally for the breeding of racehorses and hunters for sale. She kept upon the lands a number of mares and two stallions. In addition to serving the farmer's own mares, one of the stallions was used for the service of mares belonging to other owners, which mares arrived at the farm about a month before foaling, and remained there for about three months. For the service of these mares fees were received by the owner of the stallion. *Held* (affirming the King's Bench Division), that the stallion fees so received from outsiders were liable to assessment under Schedule D of the Income Tax Acts. *M'Laughlin* v. *Bailey* - - - K. B. D. (Revenue) 310

REVENUE—PRACTICE—*Issue and service of writ out of the jurisdiction—R. S. C.*, 1905, *Order* 68 (*Revenue*)—*Leave of Court.*] A writ of subpœna for the commencement of an action on the Revenue side was issued by the Commissioners of Inland Revenue against a defendant resident in England. The defendant was served in England, but did not enter an appearance. The Commissioners applied to the proper officer for a certificate of the defendant's default for the purpose of having the same transmitted to England, pursuant to sect. 23, sub-s. 2, of the Inland Revenue Regulation Act, 1890. This certificate was refused. *Held*, that the certificate was properly refused, as the writ had not been issued and served in accordance with R. S. C., 1905, Order 68 (Revenue). The leave of the Court for the issue and service of the writ should have been obtained. *Rex* v. *Gardiner* - - - K. B. D. 339

RULES AND ORDERS—R.S.C., 1905, Order 3, r. 6 f. - - - - - 444
See Practice—Judgment.

—— —— R.S.C., Order 14, r. 1 - - 444
See Practice—Judgment.

—— —— R.S.C., 1905, Order 22, r. 8 - 61
See Practice—Payment into Court.

—— —— R. S.C., 1905, Order 59, r. 77 - 233
See Malicious Injury. 1.

—— —— R.S.C., 1905, Order 68 - - 339
See Revenue—Practice.

—— —— County Court Rules, 1890 217, 233
See Malicious Injury. 1.

SERVICE OUT OF JURISDICTION—Writ of subpœna in revenue action—Leave of Court necessary for issue and service of
See Revenue—Practice. [339

SOLDIER—Return of, to civil life does not revoke will of - - - - - 332
See Probate—Grant of.

SOUTH AFRICAN INSOLVENCY — Auxiliary Order — *Bankruptcy Amendment (Ireland) Act*, 1872 (35 & 36 *Vict. c.* 58), *sect.* 71—*Insolvency in Union of South Africa—Vesting land in Ireland in trustee appointed by South African Court—Jurisdiction—Creditors in Ireland—Form of order.*] By an order of the Supreme Court of the Union of South Africa, made under the Insolvency Act, 1916, of the Union of South Africa, the estate of an insolvent was sequestrated for the benefit of his creditors; subsequently a trustee of the estate was elected, and was declared entitled to administer the estate in accordance with the said Act. The insolvent was entitled to certain freehold and leasehold property in Ireland. Under the law of the Union of South Africa the trustee was entitled to the immovable property of the insolvent situate in Ireland, so far as such right did not conflict with the law in Ireland. The Supreme Court of South Africa having requested the Irish Court to act in its aid, the trustee applied for an order vesting the said property in him. *Held*, that he was entitled to such order. *In re Bolton* - K. B. D. 324

SPIRIT—Illicit distillation, - - 179
See Illicit Distillation.

STALLION FEES—Assessment to Income Tax in respect of - - - - - 310
See Revenue—Income Tax.

"**STANDARD RENT**"—Rates paid by landlord - - - - - - 106
See War Emergency Legislation.

STATUTES—1 & 2 Wm. 4, c. 55, s. 17 179
See Illicit Distillation.

—— 6 & 7 Wm. 4, c. 116, s. 135 - - 1
See Malicious Injury. 2.

—— 6 & 7 Wm. 4, c. 116, s. 135 - - 233
See Malicious Injury. 1.

—— 6 & 7 Wm. 4, c. 116, s. 135 - - 143
See Malicious Injury. 3.

—— 6 & 7 Wm. 4, c. 116, s. 140 - - 405
See Malicious Injury. 5.

—— 1 Vict. c. 26, s. 11 - - - - 332
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STATUTES—*continued.*

—— 1 & 2 Vict. c. 56, ss. 3, 27, 92 - - 399
See Contract.

—— 5 & 6 Vict. c. 35, s. 63, Sch. B; s. 100, Sch. D. - - - - - 310
See Revenue—Income Tax.

—— 5 & 6 Vict. c. 89 - - - - 117
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—— 16 & 17 Vict. c. 34, s. 2, Schs. B & D 310
See Revenue—Income Tax.

—— 20 & 21 Vict. c. 79, s. 78 - - - 254
See Probate—Grant of Administration.

—— 35 & 36 Vict. c. 58, s. 71 - - - 324
See South African Insolvency.

—— 50 & 51 Vict. c. 20, s. 4—Criminal Law and Procedure (Ir.) Act, 1887 428, 440
See Place of Trial.

—— 61 & 62 Vict. c. 37, s. 5, sub-s. 1 - 143
See Malicious Injury. 3.

—— 61 & 62 Vict. c. 37, s. 5 - - - 233
See Malicious Injury. 1.

—— 61 & 62 Vict. c. 37, s. 5, sub-s. 2 - 405
See Malicious Injury. 5.

—— 61 & 62 Vict. c. 37, s. 52 - -
See Landlord and Tenant—Rent.

—— 6 Edw. 7, c. 58. - - - - 154
See Workmen's Compensation. 1.

—— 6 Edw. 7, c. 58, s. 1, sub-s. 1 - - 172
See Workmen's Compensation. 2.

—— 6 Edw. 7, c. 76 (Waterford Bridge Act, 1906) - - - - - 165
See By-Law.

—— 8 Edw. 7, c. 40, s. 4, sub-s. 1, s. 7 - 347
See Old Age Pension.

—— 1 Geo. 5, c. 16, s. 6 - - - - 347
See Old Age Pension.

—— 5 & 6 Geo. 5, c. 97 - - - - 106
See War Emergency Legislation.

—— 7 & 8 Geo. 5, c. 64, s. 4 - - - 192
See Parliament—Franchise. 2.

—— 8 Geo. 5, c. 7 - - - - - 106
See War Emergency Legislation.

—— 9 Geo. 5, c. 5 - - - - - 41
See Malicious Injury. 4.

—— 9 Geo. 5, c. 7 - - - - - 106
See Emergency Legislation.

—— 9 Geo. 5, c. 14 - - - - 405
See Malicious Injury. 5.

STUD FARM—Stallion fees—Mode of assessment to Income Tax - - 310
See Revenue—Income Tax.

TRAMCAR—Signal to start given by passenger [125, 133
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—— Passenger jumping from - -
See Negligence. 4.

ULTRA VIRES—By-law having effect of statute—" Conclusive as to the validity " [165
See By-Law.

ULTRA VIRES TRANSACTION—Fraudulent misrepresentation by agent of Friendly Society—Return of premium paid - - - - - - 12-20
See Insurance Policy.

UNDUE INFLUENCE—Particulars of, not ordered - - - - - 194
See Probate—Practice. 2.

VENDOR AND PURCHASER — CONTRACT — Agreement "subject to contract."] Where an offer and acceptance are made (*a*) subject to a subsequent formal contract, if such contract is a condition or term which until performed keeps the agreement in suspense, the offer and acceptance have no contractual force. On the other hand, if all the terms are agreed on, and (*b*) a formal contract is only contemplated as putting the terms in legal shape, the agreement is effectual before and irrespective of such formal contract. *Held*, reversing the judgment of Pim J., that on the facts, and in the circumstances set forth in the present case, the agreement between the parties came within (*a*), and therefore was not enforceable. The judgment entered for the suppliants was reversed, and the petition dismissed with costs accordingly. Per Gibson J.: Where it is desired to have a Petition of Right tried without a jury, an order of the Court for that purpose should be obtained beforehand, so as not to allow the case to proceed to trial with a jury, which could only be discharged by consent. *Thompson & Son, Ltd.*, v. *Rex* - K.B.D. 365
[Affirmed by Court of Appeal.]

VENUE - - - - - - - 428-440
See Place of Trial.

VOLENTI NON FIT INJURIA - 63, 74
See Negligence. 4.

WAR EMERGENCY LEGISLATION — Landlord and tenant—*Recovery of possession—"Standard rent"—Rates paid by landlord—*

WAR EMERGENCY LEGISLATION—*continued.*

Increase of Rent and Mortgage Interest (Restrictions) Acts, 1915-1919 (5 & 6 *Geo.* 5, *c.* 97; 8 *Geo.* 5, *c.* 7; *and* 9 *Geo.* 5, *c.* 7.)] A lease existing on 3rd August, 1914, reserved a rent of £58, free of all taxes. *Held*, that £58 was the standard rent within the meaning of the Increase of Rent and Mortgage Interest (Restrictions) Acts, 1915-1919 (5 & 6 Geo. 5, c. 97; 8 Geo. 5, c. 7; and 9 Geo. 5, c. 7). *Lawrie* v. *Woods* K.B.D. 106

WOMAN - - - - - - - - 192
See Parliament—Franchise. 2.

WORDS—" Duly determined by notice to quit " [444
See Practice—Judgment.

—— " Conclusive as to the validity " - 165
See By-Law.

—— " Contract to the contrary respecting such deduction " - - 47, 412
See Landlord and Tenant—Rent.

—— " House or place " - - - - 179
See Illicit Distillation.

—— " Husband entitled to be so registered " 192
See Parliament—Franchise. 2.

—— " Person injured " - - - - 233
See Malicious Injury.

—— " Place."
See Illicit Distillation.

—— " Proprietor or occupier " - - 179
See Illicit Distillation.

—— "Standard rent" - - - - - 106
See War Emergency Legislation.

—— " Subject to contract " - - - 365
See Vendor and Purchaser—Contract.

—— " Yearly value of any benefit or privilege enjoyed " - - - 347, 355
See Old Age Pension.

1. WORKMEN'S COMPENSATION *Act*, 1906 (6 *Edw.* 7, *c.* 58)—**Accident**—*Engine-driver—Death supervening from pneumonia.*] An engine-driver, who had to take out an early train, was, on a morning in March which was bitterly cold and snowy, called late by a fellow-workman, and hurried to his engine, insufficiently clad, and without his usual food. On the same or the following day, as to which there was a conflict of evidence, whilst engaged in his employment, he collapsed, and subsequently died of pneumonia.

WORKMEN'S COMPENSATION—*continued.* *Held*, that the death was not the result of an injury by accident within the meaning of the Workmen's Compensation Act, 1906. *In re Workmen's Compensation Act*, 1906; *Dennis* v. *Midland Railway Company, Ltd.* - App. 154

2. **WORKMEN'S COMPENSATION—Selection of dangerous route**—*Alternative and safe route available—Workmen fatally injured—Accident arising out of and in course of employment—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *sect.* 1, *sub-s.* 1.] A mate employed on a dredger had to shift about from side to side for the purpose of performing his duties. He elected to cross the vessel by an obviously dangerous, but not prohibited, route, although an alternative and comparatively safe way was available. He was caught between platform and mast, and sustained injuries which resulted in his death. *Held*, that the accident arose out of and in the course of the employment. There is a distinction between the case of a workman who, whilst actually engaged in the work of his employer, resorts to a dangerous route or method, and that of a workman who, though still under his contract of service, acts similarly for his own convenience or advantage. *Rossiter* v. *Commissioners of the Port of Waterford* [App. 172

THE END.

BIBL. LONDIN. UNIV.